

**This volume was donated to LLMC
to enrich its on-line offerings and
for purposes of long-term preservation by**

Northwestern University School of Law

National Reporter System.

United States Series.

THE FEDERAL REPORTER.

VOL. 6.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

MARCH—MAY, 1881

PEYTON BOYLE, EDITOR.

SAINT PAUL:
WEST PUBLISHING COMPANY.
1881.

**COPYRIGHT, 1881,
BY
WEST PUBLISHING COMPANY,**

CASES REPORTED.

	Page		Page
Abbot, Wilbur v.	814, 817	Bromley, Main v.	477
Adams v. Bridgewater Iron Co.	179	Brown v. Deere, Mansur & Co.	484, 487
Albany City Nat. Bank v. Maher	417	Brusl, Nat. Bank of Rising Sun, Indiana v.	132
Allerton v. City of Chicago	555	Bryant v. Leyland	125
Amsden, United States v.	819	Burdick v. Peterson	840
Andoe, Sullivan v.	641	Butler, Douglas v.	228
Arnold, Barlow v.	351	Camille, In re	256
Arturo, The	308	Carr, Strafer v.	466
Atlas Bag Co., Union Paper Bag Machine Co. v.	398	Central Nat. Bank of Philadelphia, United States v.	134
Baer, United States v.	42	Chambers, Matthews v.	874
Baldwin, State of Indiana v.	30	Chapin v. Walker	794
Baltimore & O. R. Co., Emigh v.	283	Charles Morgan, The	913
Baltimore & O. R. Co., Stevens v.	283	Chicago, B. & Q. R. Co., Pool v.	844
Bank of British North America v. Miller	545	Chouteau, Hamilton v.	339
Barge No. 6	732	Citizens' Ins. Co. of Pittsburgh, Penn., Runkle v.	143
Barlow v. Arnold	351	City of Chicago, Allerton v.	555
Barnes v. Potter	661	City of Chillicothe, Page v.	599
Barnes v. Steere	661	City of Portland v. Oregonian Ry. Co.	321
Barnes v. Vial	661	City of St. Louis v. The Knapp, Stout & Co. Company	221
Barnes, Vetterlein v.	693	Claybourn, Howe Machine Co. v.	438
Barney, Schmeider v.	150	Cleveland, Lockwood v.	721
Barney v. W. & St. P. R. Co.	802	Cleone, The	517
Bate Refrigerating Co. v. Toffey	514	Cochran, Fence v.	269
Beck, Gray v.	595	Collard v. D., L. & W. R. Co.	246
Behera, The	400	Comstock, Peck v.	22
Ben Hooley, The	318	Conway, United States v.	49
Bigelow, First Nat. Bank of Hannibal, Mo., v.	215	Coon, Wilson v.	611
Bixby, United States v.	375	Cozzens, Peckham v.	598
Blakemore v. Heyman	581	Cozzens, Smith v.	598
Board of Sup'rs of Albany Co., Stanley v.	561	Cross v. Morgan	241
Boston Marine Ins. Co., Lunt v.	562	Cunningham, Oliver v.	60
Boylston, Dare v.	493	Cutting v. Cutting	259
Bragg, Griswold v.	342	Dalles City v. Missionary Society of the M. E. Church	356
Bridgewater Iron Co., Adams v.	179	Dare v. Boylston	493
Bristol, The	638		
Broderick, Falls Wire Manuf'g Co. v.	654		

	Page		Page
Davis, United States v.....	682	Hall Railroad Signal Co., Elec-	
Dawes v. Peebles.....	856	tric Railroad Signal Co. v.....	603
Deere, Mansur & Co., Brown v.	484, 487	Hamilton v. Chouteau.....	339
Delaware, L. & W. R. Co., Col-		Hammond's Adm'r, Gaines v..	449
lard v.....	246	Harwood, Oberteuffer v.....	828
Delaware, The.....	195	Hatch v. Wallamet Iron Bridge	
Dilworth v. Johnson.....	459	Co.....	326, 780
Dodge, Register v.....	6	Hayes, Fischer v.....	63, 76, 86
Dormitzer v. Illinois & St. Louis		Hazard, Rhode Island Hospital	
Bridge Co.	217	Trust Co. v.....	119
Doty v. Johnson.....	481	Heidritter v. Elizabeth Oil-Cloth	
Douglass v. Vogeler.....	53	Co.....	138
Douglas v. Butler.....	228	Hendecker v. Rosenbaum.....	97
Dudgeon, Mansfield v.....	584	Hero, The.....	526
Duff, United States v.....	45	Hester, Singer Manuf'g Co. v..	804
Eames, Straw Sewing Machine		Heyman, Blakemore v.....	581
Co. v.....	181	Hollender, Putnam v.....	882
Edwin Post, The.....	206	Howe Machine Co. v. Claybourn	438
Edwin Post, The, Olsen v.....	314	Hudson, The.....	830
Effie J. Simmons, The.....	639	Hughes, First Nat. Bank of	
Elkings, In re.....	170	Youngstown v.....	737
Electric Railroad Signal Co. v.		Hulbert, Latrobe v.....	209
Hall Railroad Signal Co.....	603	Hutchinson v. Green.....	833
Elizabeth Oil-Cloth Co., Heidrit-		Hyde, In re.....	587, 869
ter v.....	138	Hyde, Knevals v.....	651
Emigh v. B. & O. R. Co.....	283	Illinois Cent. R. Co., Kaeiser v.	1
English, In re.....	276	Illinois & St. Louis Bridge Co.,	
Falls Wire Manuf'g Co. v. Bro-		Dormitzer v.....	217
derick.....	654	In re Camille.....	256
Fargo v. L., N. A. & C. Ry.		In re Elkings.....	170
Co.....	787	In re English.....	276
Farmers' Loan & Trust Co. v.		In re Hyde.....	587, 869
G. B. & M. R. Co.....	100	In re King.....	587, 869
Farnsworth, The.....	307	In re Michel.....	706
Fawcett v. The L. W. Morgan..	200	In re Mott.....	685
First Nat. Bank of Hannibal,		In re Receivership of Iowa &	
Mo., v. Bigelow.....	215	Minnesota Construction Co..	799
First Nat. Bank of Hannibal,		In re Stevenson.....	710
Mo. v. Smith.....	215	Insurance Co. of North Amer-	
First Nat. Bank of Youngstown		ica, Taylor v.....	410
v. Hughes.....	737	International & Great Northern	
Fischer v. Hayes.....	63, 76, 86	R. Co., Texas Express Co. v..	426
Fischer v. Neil.....	89	Isgrigg, Pickel v.....	676
Fischer v. O'Shaughnessey....	92	Jefferson Borden, The.....	301
Fletcher, Fuller v.....	125	John A. Berkman, The.....	535
Foster, Unites States v.....	247	Johnson, Dilworth v.....	459
Fox, Marks v.....	727	Johnson, Doty v.....	481
Fuller v. Fletcher.....	128	Johnson v. Lewis.....	27
Gaines v. Hammond's Adm'r..	449	Johnson, Waring v.....	500
Galina, The.....	927	J. S. Woodward, The.....	636
Gillespie, United States v.....	803	Kaeiser v. Illinois Cent. R. Co.	1
Gray v. Beck.....	595	Kelly v. Missionary Society of	
Green Bay & Minn. R. Co., Farm-		the M. E. Church.....	356
ers' Loan & Trust Co. v.....	100	King, In re.....	587, 869
Green, Hutchinson v.....	833	Knapp, Stout & Co. Company,	
Griswold v. Bragg.....	342	City of St. Louis v.....	221
		Knevals v. Hyde.....	651

	Page		Page
Lane, Ex parte.....	34	Oberteuffer v. Harwood.....	828
Latrobe v. Hulbert.....	209	Oliver v. Cunningham.....	60
Lewis, Johnson v.....	27	Olsen v. The Edwin Post.....	314
Lewis, Shainwald v.....	753, 766	Oregonian Ry. Co., City of Port-	
Leyland, Bryant v.....	125	land v.....	321
Lindsay, Rowell v.....	290	O'Shaughnessey, Fischer v.....	92
Lindsay, Sterritt & Co., Stro-			
bridge v.....	510	Page v. City of Chillicothe.....	599
Lockwood v. Cleaveland.....	721	Peckham v. Cozzens.....	598
Louisville, N. A. & C. Ry. Co.,		Peck v. Comstock.....	22
Fargo v.....	787	Peebles, Dawes v.....	856
Ludlow, Westphal v.....	348	Pence v. Cochran.....	269
Lunt v. Boston Marine Ins. Co.	562	Peterson, Burdick v.....	840
L. W. Morgan, The, Fawcett v.	200	Philadelphia Trust, Safe Deposit	
		& Ins. Co. v. Seventh Nat.	
Mackaye v. Mallory.....	743	Bank of Philadelphia.....	114
Maher, Albany City Nat. Bank v.	417	Pickel v. Isgrigg.....	676
Main v. Bromley.....	477	Pool v. C., B. & Q. R. Co.....	844
Mallory, Mackaye v.....	743	Potter, Barnes v.....	661
Mansfield v. Dudgeon.....	584	Putnam v. Hollender.....	882
Mariei, The.....	831	Putnam v. Von Hofe.....	897
Marine City, The.....	413		
Marks v. Fox.....	727	Receivership of Iowa & Minne-	
Marks v. Schwartz.....	727	sota Construction Co., In re.....	799
Mary Shaw, The.....	918	Reed v. Weld.....	304
Matthews v. Chambers.....	874	Register v. Dodge.....	6
Matthews v. Warner.....	461	Rhode Island Hospital Trust Co.	
Mayer, Wear v.....	658	v. Hazard.....	119
May & Eva, The.....	628	Rosenbaum, Hendecker v.....	97
Memphis, C. & N. W. R. Co.,		Rose, United States v.....	136
Walsh v.....	797	Rowell v. Lindsay.....	290
Memphis & L. R. R. Co., United		Ruckman v. Ruckman.....	225
States v.....	237	Runkle v. Citizens' Ins. Co. of	
Merriam, Smith v.....	713, 903	Pittsburgh, Penn.....	143
Michel, In re.....	706		
Miller, Bank of British North		Samuel H. Crawford, The.....	906
America v.....	545	Schneider v. Barney.....	150
Missionary Society of the M. E.		Schreiber v. Sharpless.....	175
Church, Dalles City v.....	356	Schultz v. Mutual Life Ins. Co.	
Missionary Society of the M. E.		of New York.....	672
Church, Kelly v.....	356	Schwartz, Marks v.....	727
Mississippi, The.....	543	Schwed, Smith v.....	455
Morgan, Cross v.....	241	Seventh Nat. Bank of Phila-	
Mott, In re.....	685	delphia, Philadelphia Trust,	
Mutual Life Ins. Co. of New		Safe Deposit & Ins. Co. v.....	114
York, Schultz v.....	672	Shainwald v. Lewis.....	753, 766
		Sharpless, Schreiber v.....	175
National Bank of Rising Sun,		Short Cut, The.....	630
Indiana, v. Brush.....	132	Sill v. Solberg.....	468
National Park Bank of New		Singer Manuf'g Co. v. Hester..	804
York, United States v.....	852	Singer Manuf'g Co. v. Stanage.	279
Neil, Fischer v.....	89	Slater, United States v.....	824
New Haven Savings Bank, Yale		S. L. Goodal, The.....	539
Lock Manuf'g Co. v.....	377	Smith, First Nat. Bank of Han-	
Niagara, The.....	906	nibal, Mo. v.....	215
Niantic, The.....	632	Smith v. Cozzens.....	598
Norman, The.....	406	Smith v. Merriam.....	713, 903
Norton, Vary v.....	808	Smith v. Schwed.....	455
Norwich Nat. Bank, Yale Lock		Solberg, Sill v.....	468
Manuf'g Co. v.....	377	S. Shaw, The.....	93

	Page		Page
Stanage, Singer Manuf'g Co. v.	279	United States v. Rose.....	136
Stanley v. Board of Sup'rs of Albany Co.....	561	United States v. Slater.....	824
State of Indiana v. Baldwin....	30	United States v. Thornburg....	41
Steere, Barnes v.....	661	United States v. Veazie.....	867
Steiger v. Third Nat. Bank.....	569	United States v. Watkinds....	152
Stevenson, In re.....	710	United States v. Wise.....	41
Stevens v. B. & O. R. Co.....	283	United States v. Yates.....	861
Strafer v. Carr.....	466	University of Chicago, Union Mut. Life Ins. Co. v.....	443
Straw Sewing Machine Co. v. Eames.....	181	Vary v. Norton.....	808
Strobridge v. Lindsay, Sterritt & Co.....	510	Veazie, United States v.....	867
Sullivan v. Andoe.....	641	Vesta, The.....	532
Taylor v. Ins. Co. of North America.....	410	Vetterlein v. Barnes.....	693
Texas Express Co. v. International & Great Northern R. Co.....	426	Viall, Barnes v.....	661
Texas Express Co. v. Texas & Pacific Ry. Co.....	426	Vogeler, Douglass v.....	53
Texas & Pacific Ry. Co., Texas Express Co. v.....	426	Von Hofe, Putnam v.....	897
Third Nat. Bank, Steiger v....	569	Wald v. Wehl.....	163
Thornburg, United States v....	41	Walker, Chapin v.....	794
Toffey, Bate Refrigerating Co. v.	514	Wallamet Iron Bridge Co., Hatch v.....	326, 780
Union Mut. Life Ins. Co. v. The University of Chicago.....	443	Walsh v. M., C. & N. W. R. Co.....	797
Union Paper Bag Machine Co. v. Atlas Bag Co.....	398	Waring v. Johnson.....	500
United States v. Amsdem.....	819	Warner, Matthews v.....	461
United States v. Baer.....	42	Watkinds, United States v.....	152
United States v. Bixby.....	375	Wear v. Mayer.....	658
United States v. Central Nat. Bank of Philadelphia.....	134	Wehl, Wald v.....	163
United States v. Conway.....	49	Weld, Reed v.....	304
United States v. Davis.....	682	Westphal v. Ludlow.....	348
United States v. Duff.....	45	Wilbur v. Abbot.....	814, 817
United States v. Foster.....	247	Wm. Murtagh, The, Worth v....	192
United States v. Gillespie.....	803	Wilson v. Coon.....	611
United States v. M. & L. R. R. Co.....	237	Wilson v. Winter.....	16
United States v. Nat. Park Bank of New York.....	852	Winona & St. P. R. Co., Barney v.....	802
		Winter, Wilson v.....	16
		Wise, United States v.....	41
		Worth v. The Wm. Murtagh...	192
		Yale Lock Manuf'g Co. v. New Haven Savings Bank.....	377
		Yale Lock Manuf'g Co. v. Norwich Nat. Bank.....	377
		Yates, United States v.....	861

CASES REPORTED.

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS
AND DISTRICTS.

	Page		Page
FIRST CIRCUIT.		United States v. Davis..... 682	
CIRCUIT COURT, D. MASSACHUSETTS.		Vesta, The..... 532	
Adams v. Bridgewater Iron Co. 179		Weld, Reed v..... 304	
Arturo, The 308		CIRCUIT COURT, D. NEW HAMPSHIRE.	
Bigelow, First Nat. Bank of Hannibal, Mo., v..... 215		Abbot, Wilbur v..... 814, 817	
Bridgewater Iron Co., Adams v. 179		Wilbur v. Abbot..... 814, 817	
Bryant v. Leyland..... 125		CIRCUIT COURT, D. RHODE ISLAND.	
Dormitzer v. Illinois & St. Louis Bridge Co..... 217		Barnes v. Potter..... 661	
First Nat. Bank of Hannibal, Mo., v. Bigelow..... 215		Barnes v. Steere..... 661	
First Nat. Bank of Hannibal, Mo. v. Smith..... 215		Barnes v. Vial..... 661	
Illinois & St. Louis Bridge Co., Dormitzer v..... 217		Cozzens, Peckham v..... 598	
Insurance Co. of North America, Taylor v..... 410		Cozzens, Smith v..... 598	
Leyland, Bryant v..... 125		Fletcher, Fuller v..... 128	
Matthews v. Warner..... 461		Fuller v. Fletcher..... 128	
Merriam, Smith v..... 713, 903		Hazard, Rhode Island Hospital Trust Co. v..... 119	
Smith, First Nat. Bank of Hannibal, Mo. v..... 215		Peckham v. Cozzens..... 598	
Smith v. Merriam..... 713, 903		Potter, Barnes v..... 661	
Taylor v. Ins. Co. of North America..... 410		Rhode Island Hospital Trust Co. v. Hazard..... 119	
United States v. Veazie..... 867		Smith v. Cozzens..... 598	
Veazie, United States v..... 867		Steere, Barnes v..... 661	
Warner, Matthews v..... 461		Viall, Barnes v..... 661	
DISTRICT COURT, D. MASSACHUSETTS.		SECOND CIRCUIT.	
Davis, United States v..... 682		CIRCUIT COURT, D. CONNECTICUT.	
Effe J. Simmons, The..... 639		Bragg, Griswold v..... 342	
John A. Berkman, The..... 535		Electric Railroad Signal Co. v. Hall Railroad Signal Co..... 603	
Mississippi, The..... 543			
Reed v. Weld..... 304			

	Page		Page
Griswold v. Bragg	342	Dare v. Boylston	493
Hall Railroad Signal Co., Elec-		Duff, United States v.	45
tric Railroad Signal Co. v.	603	Eames, Straw Sewing Machine	
New Haven Savings Bank, Yale		Co. v.	181
Lock Manuf'g Co. v.	377	Fischer v. Hayes	63, 76, 86
Norwich Nat. Bank, Yale Lock		Fischer v. Neil	89
Manuf'g Co. v.	377	Fischer v. O'Shaughnessey	92
Yale Lock Manuf'g Co. v. New		Fox, Marks v.	727
Haven Savings Bank	377	Hayes, Fischer v.	63, 76, 86
Yale Lock Manuf'g Co. v. Nor-		Hendecker v. Rosenbaum	97
wich Nat. Bank	377	Hollender, Putnam v.	882
		Hyde, In re	587
DISTRICT COURT, D. CONNECTICUT.		In re Hyde	587
Niantic, The	632	In re King	587
S. L. Goodal, The	539	Johnson, Waring v.	500
		King, In re	587
CIRCUIT COURT, E. D. NEW YORK.		Lunt v. Boston Marine Ins. Co.	562
Dodge, Register v.	6	Mackaye v. Mallory	743
Register v. Dodge	6	Mallory, Mackaye v.	743
		Marks v. Fox	727
DISTRICT COURT, E. D. NEW YORK.		Marks v. Schwartz	727
Bristol, The	638	Mutual Life Ins. Co. of New	
Galina, The	927	York, Schultz v.	672
Niagara, The	906	Neil, Fischer v.	89
Samuel H. Crawford, The	906	O'Shaughnessey, Fischer v.	92
United States v. Yates	861	Putnam v. Hollender	882
Wm. Murtagh, The, Worth v. ..	192	Putnam v. Von Hofe	897
Worth v. The Wm. Murtagh ...	192	Rosenbaum, Hendecker v.	97
Yates, United States v.	861	Schmeider v. Barney	150
		Schultz v. Mutual Life Ins. Co.	
CIRCUIT COURT, N. D. NEW YORK.		of New York	672
Albany City Nat. Bank v. Maher	417	Schwartz, Marks v.	727
Board of Sup'rs of Albany Co.,		Straw Sewing Machine Co. v.	
Stanley v.	561	Eames	181
Maher, Albany City Nat. Bank v.	417	United States v. Baer	42
Stanley v. Board of Sup'rs of Al-		United States v. Conway	49
bany Co.	561	United States v. Duff	45
		Vetterlein v. Barnes	693
DISTRICT COURT, N. D. NEW YORK.		Von Hofe, Putnam v.	897
Doty v. Johnson	481	Wald v. Wehl	163
Johnson, Doty v.	481	Waring v. Johnson	500
J. S. Woodward, The	636	Wehl, Wald v.	163
		Wilson v. Coon	611
CIRCUIT COURT, S. D. NEW YORK.			
Baer, United States v.	42	DISTRICT COURT, S. D. NEW YORK.	
Barnes, Vetterlein v.	693	Delaware, The	195
Barney, Schmeider v.	150	Hyde, In re	869
Boston Marine Ins. Co., Lunt v.	562	In re Hyde	869
Boylston, Dare v.	493	In re King	869
Conway, United States v.	49	In re Michel	706
Coon, Wilson v.	611	In re Mott	685
		King, In re	869
		Maricl, The	831
		Michel, In re	706
		Mott, In re	685
		National Park Bank of New	
		York, United States v.	852
		United States v. Nat. Park Bank	
		of New York	852

THIRD CIRCUIT.

	Page
DISTRICT COURT, D. DELAWARE.	
Edwin Post, The.....	206
Edwin Post, The, Olsen v.....	314
Jefferson Borden, The.....	301
Olsen v. The Edwin Post	314

CIRCUIT COURT, D. NEW JERSEY.

Bate Refrigerating Co. v. Toffey	514
Butler, Douglas v.....	228
Cleveland, Lockwood v.....	721
Collard v. D., L. & W. R. Co..	246
Cross v. Morgan.....	241
Delaware, L. & W. R. Co., Col- lard v.....	246
Douglas v. Butler.....	228
Elizabeth Oil-Cloth Co., Heidrit- ter v.....	138
Gillespie, United States v.....	803
Heidritter v. Elizabeth Oil-Cloth Co.....	138
Lockwood v. Cleveland.....	721
Morgan, Cross v.....	241
Ruckman v. Ruckman.....	225
Toffey, Bate Refrigerating Co. v.	514
United States v. Gillespie.....	803

DISTRICT COURT, D. NEW JERSEY.

Beck, Gray v.....	595
Dilworth v. Johnson.....	459
Eking, In re.....	170
Gray v. Beck.....	595
In re Eking.....	170
Johnson, Dilworth v.....	459
May & Eva, The.....	628

CIRCUIT COURT, E. D. PENNSYLVANIA.

Atlas Bag Co., Union Paper Bag Machine Co. v.....	398
Union Paper Bag Machine Co. v. Atlas Bag Co.....	398

DISTRICT COURT, E. D. PENNSYLVANIA.

Barge No. 6.....	732
Behera, The.....	400
Ben Hooley, The.....	318
Central Nat. Bank of Philadel- phia, United States v.....	134
Farnsworth, The.....	307

	Page
Hero, The.....	526
Norman, The.....	406
Schreiber v. Sharpless.....	175
Sharpless, Schreiber v.....	175
S. Shaw, The.....	93
United States v. Central Nat. Bank of Philadelphia.....	134

CIRCUIT COURT, W. D. PENNSYLVANIA.

Chambers, Matthews v.....	874
Lindsay, Sterritt & Co., Stro- bridge v.....	510
Matthews v. Chambers.....	874
Strobridge v. Lindsay, Sterritt & Co.....	510

DISTRICT COURT, W. D. PENNSYLVANIA.

English, In re.....	276
Fawcett v. The L. W. Morgan..	200
Hudson, The.....	830
In re English.....	276
In re Stevenson.....	710
L. W. Morgan, The, Fawcett v.	200
Philadelphia Trust, Safe Deposit & Ins. Co. v. Seventh Nat. Bank of Philadelphia.....	114
Seventh Nat. Bank of Phila- delphia, Philadelphia Trust, Safe Deposit & Ins. Co. v....	114
Short Cut, The.....	630
Stevenson, In re.....	710

FOURTH CIRCUIT.

CIRCUIT COURT, D. MARYLAND.

Andoe, Sullivan v.....	641
Baltimore & O. R. Co., Emigh v.	283
Baltimore & O. R. Co., Ste- vens v.....	283
Emigh v. B. & O. R. Co.....	283
Stevens v. B. & O. R. Co.....	283
Sullivan v. Andoe.....	641

DISTRICT COURT, D. MARYLAND.

Mary Shaw, The.....	918
---------------------	-----

CIRCUIT COURT, E. D. VIRGINIA.

Foster, United States v.....	247
United States v. Foster..	247

FIFTH CIRCUIT.

	Page
CIRCUIT COURT, N. D. TEXAS.	
International & Great Northern R. Co., Texas Express Co. v.	426
Slater, United States v.	824
Texas Express Co. v. International & Great Northern R. Co.	426
Texas Express Co. v. Texas & Pacific Ry. Co.	426
Texas & Pacific Ry. Co., Texas Express Co. v.	426
United States v. Slater	824

SIXTH CIRCUIT.

CIRCUIT COURT, D. KENTUCKY.	
Arnold, Barlow v.	351
Barlow v. Arnold	351
Blakemore v. Heyman	581
Heyman, Blakemore v.	581

DISTRICT COURT, D. KENTUCKY.

Charles Morgan, The.	913
------------------------------	-----

CIRCUIT COURT, W. D. MICHIGAN.

Cunningham, Oliver v.	60
Oliver v. Cunningham.	60

CIRCUIT COURT, W. D. MICHIGAN,
S. D.

Claybourn, Howe Machine Co. v.	438
Dudgeon, Mansfield v.	584
Howe Machine Co. v. Claybourn	438
Mansfield v. Dudgeon	584
Norton, Vary v.	808
Vary v. Norton.	808

DISTRICT COURT, E. D. MICHIGAN.

Lane, Ex parte.	34
Marine City, The.	413

CIRCUIT COURT, N. D. OHIO.

First Nat. Bank of Youngstown v. Hughes	737
Hughes, First Nat. Bank of Youngstown v.	737

CIRCUIT COURT, S. D. OHIO.

Citizens' Ins. Co. of Pittsburgh, Penn., Runkle v.	143
City of Chillicothe, Page v.	599
Dawes v. Peebles.	856
Hulbert, Latrobe v.	209
Latrobe v. Hulbert.	209
Page v. City of Chillicothe.	599
Peebles, Dawes v.	856
Rose, United States v.	136
Runkle v. Citizens' Ins. Co. of Pittsburgh, Penn.	143
United States v. Rose.	136

DISTRICT COURT, S. D. OHIO.

Carr, Strafer v.	466
Cochran, Pence v.	269
Douglass v. Vogeler.	53
Pence v. Cochran.	269
Strafer v. Carr	466
Thornburg, United States v.	41
United States v. Thornburg	41
United States v. Wise	41
Vogeler, Douglass v.	53
Wise, United States v.	41

CIRCUIT COURT, W. D. TENNESSEE.

Memphis & L. R. R. Co., United States v.	237
United States v. M. & L. R. R. Co.	237

SEVENTH CIRCUIT.

CIRCUIT COURT, N. D. ILLINOIS.

Allerton v. City of Chicago.	555
City of Chicago, Allerton v.	555
Union Mut. Life Ins. Co. v. The University of Chicago	443
University of Chicago, Union Mut. Life Ins. Co. v.	443

CIRCUIT COURT, D. INDIANA.

Baldwin, State of Indiana v.	30
Brush, Nat. Bank of Rising Sun, Indiana v.	132
Fargo v. L., N. A. & C. Ry. Co.	787
Isgrigg, Pickel v.	676
Louisville, N. A. & C. Ry. Co., Fargo v.	787

	Page
National Bank of Rising Sun, Indiana, v. Brush.....	132
Pickel v. Isgrigg	676
State of Indiana v. Baldwin....	30

DISTRICT COURT, D. INDIANA.

Amsden, United States v.....	819
Bixby, United States v.....	375
United States v. Amsdem.....	819
United States v. Bixby.....	375

CIRCUIT COURT, E. D. WISCONSIN.

Farmers' Loan & Trust Co. v. G. B. & M. R. Co.....	100
Green Bay & Minn. R. Co., Farm- ers' Loan & Trust Co. v.....	100
Lindsay, Rowell v.....	290
Rowell v. Lindsay.....	290

CIRCUIT COURT, W. D. WISCONSIN.

Comstock, Peck v.....	22
Peck v. Comstock.....	22
Sill v. Solberg.....	468
Solberg, Sill v.....	468
Wilson v. Winter.....	16
Winter, Wilson v.....	16

DISTRICT COURT, W. D. WISCONSIN.

Bromley, Main v.....	477
Main v. Bromley.....	477

EIGHTH CIRCUIT.

CIRCUIT COURT, E. D. ARKANSAS.

Chapin v. Walker.....	794
Johnson v. Lewis.....	27
Lewis, Johnson v.....	27
Walker, Chapin v.....	794

CIRCUIT COURT, D. IOWA.

Burdick v. Peterson.....	840
Chicago, B. & Q. R. Co., Pool v.	844
Illinois Cent. R. Co., Kaeiser v.	1
In re Receivership of Iowa & Minnesota Construction Co..	799
Kaeiser v. Illinois Cent. R. Co.	1
Peterson, Burdick v.....	840
Pool v. C., B. & Q. R. Co.....	844

Receivership of Iowa & Minne- sota Construction Co., In re..	799
---	-----

CIRCUIT COURT, D. MINNESOTA.

Barney v. W. & St. P. R. Co...	802
Ludlow, Westphal v.....	348
Westphal v. Ludlow.....	348
Winona & St. P. R. Co., Bar- ney v.....	802

DISTRICT COURT, D. MINNESOTA.

Harwood, Oberteuffer v.....	828
Oberteuffer v. Harwood.....	828

CIRCUIT COURT, E. D. MISSOURI.

Broderick, Falls Wire Manuf'g Co. v.....	654
Brown v. Deere, Mansur & Co..	484, 487
Chouteau, Hamilton v.....	339
City of St. Louis v. The Knapp, Stout & Co. Company.....	221
Deere, Mansur & Co., Brown v.	484, 487
Falls Wire Manuf'g Co. v. Bro- derick.....	654
Gaines v. Hammond's Adm'r..	449
Green, Hutchinson v.....	833
Hamilton v. Chouteau.....	339
Hammond's Adm'r, Gaines v..	449
Hutchinson v. Green.....	833
Knapp, Stout & Co. Company, City of St. Louis v.....	221
Mayer, Wear v.....	658
Memphis, C. & N. W. R. Co., Walsh v.....	797
Singer Manuf'g Co. v. Stanage.	279
Stanage, Singer Manuf'g Co. v.	279
Steiger v. Third Nat. Bank....	569
Third Nat. Bank, Steiger v....	569
Walsh v. M., C. & N. W. R. Co.	797
Wear v. Mayer.....	658

CIRCUIT COURT, W. D. MISSOURI,
W. D.

Hester, Singer Manuf'g Co. v..	804
Schwed, Smith v.....	455
Singer Manuf'g Co. v. Hester..	804
Smith v. Schwed.....	455

CIRCUIT COURT, D. NEBRASKA.

Hyde, Knevals v.....	651
Knevals v. Hyde.....	651

NINTH CIRCUIT.		Page		Page
DISTRICT COURT, D. CALIFORNIA.			Miller, Bank of British North America v.	545
Cleone, The.	517		Oregonian Ry. Co., City of Portland v.	321
Lewis, Shainwald v.	753, 766		United States v. Watkins.	152
Shainwald v. Lewis.	753, 766		Wallamet Iron Bridge Co., Hatch v.	326, 780
			Watkins, United States v.	152
CIRCUIT COURT, D. OREGON.			DISTRICT COURT, D. OREGON.	
Bank of British North America v. Miller.	545		Dalles City v. Missionary Society of the M. E. Church.	356
Camille, In re.	256		Kelly v. Missionary Society of the M. E. Church.	356
City of Portland v. Oregonian Ry. Co.	321		Missionary Society of the M. E. Church, Dalles City v.	356
Cutting v. Cutting.	259		Missionary Society of the M. E. Church, Kelly v.	356
Hatch v. Wallamet Iron Bridge Co.	326, 780			
In re Camille.	256			

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts

KAEISER v. ILLINOIS CENT. R. Co.

(Circuit Court, D. Iowa. October 20, 1880.)

1. REMOVAL—WHEN REQUISITE CITIZENSHIP MUST EXIST.

A case cannot be removed, under the act of 1875, on the ground of citizenship, unless it appears from the record that at the time the suit was commenced the parties were citizens of different states.

2. SAME—AMENDMENT OF RECORD.

In such case, an amended transcript may be filed, where the record in the state court did in fact disclose the requisite citizenship, under the statute, before the order of removal was made.

3. SAME—SAME.

Quere, whether such record of the state court can be amended so as to conform to the statute, where the term has passed "at which by law the cause could be first tried" in the state court.—[Ed.]

Petition for Removal.

On the third day of February, 1880, the plaintiff commenced his action in the district court of Cherokee county, Iowa. Defendant appeared in the state court at the February term, 1880, and at that term the plaintiff filed his petition for removal to this court:

v.6,no.1—1

In the District Court of the State of Iowa, in and for Cherokee County.

W. M. KAEISER, Plaintiff, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

PETITION FOR REMOVAL.

To the said District Court:

Your petitioner respectfully represents that he is a resident of Polk county, in the state of Iowa; that the defendant, the Illinois Central Railroad Company, is a corporation duly and legally organized under the laws of the state of Illinois; that this suit is a suit at law, and of a civil nature, and that the amount in dispute exceeds, exclusive of costs, the sum of five hundred (\$500) dollars; wherefore your petitioner prays that an order be made removing this suit to the United States circuit court for the district of Iowa, in accordance with the provisions of section 639 of the Revised Statutes of the United States.

W. M. KAEISER,

By BERRYHILL & HENRY,

A. B. & J. C. CUMMINS,

His Attorneys.

State of Iowa, Polk County—ss.:

I, W. M. Kaeiser, being sworn, do say that I have read the foregoing petition, and that the statements thereof are true, as I verily believe.

W. M. KAEISER.

Subscribed and sworn to by said W. M. Kaeiser, this fourteenth day of February, 1880, before me.

[Seal.]

GEO. F. HENRY, Notary Public.

Filed February 17, 1880.

OSCAR CHASE, Clerk.

An order of removal was made, and a transcript of the record has been filed in this court. Answer has been filed here, and a demurrer thereto has been argued; but the court, doubting its jurisdiction, called the attention of counsel to

the question of the sufficiency of the petition for removal, and requested their views in writing thereon.

These having been furnished, the question has been fully considered by the full bench, with the result stated in the following opinion.

A. B. & J. C. Cummins and Berryhill & Henry, for plaintiff.

John F. Duncombe, for defendant.

MCCRARY, C. J. It was settled by the case of *Ins. Co. v. Pechner*, 95 U. S. 183, that under the twelfth section of the judiciary act of 1789, embodied in section 639 of the Revised Statutes, a cause cannot be removed from a state to a federal court unless the petition for removal or the record of the cause affirmatively shows that at the time of the commencement of the suit the parties were citizens of different states. The right of removal was held to be statutory, and it was decided that before a party can avail himself of it, to oust the jurisdiction of a state court, he must show, upon the record, that his case is one which comes within the provisions of the statute. It is also clear, upon the authority of the case just cited, as well as upon well-settled principles, that the removal of the record of a cause from a state court into this court, where neither the petition for removal nor the record shows that the case is removable, is an utterly void proceeding, which neither confers jurisdiction upon this court nor takes it from the state court.

Under the act above cited the fact of the citizenship of the parties at the time of the commencement of the suit is jurisdictional, and must in every case appear in the record. The fact that it may exist *in pais* is of no importance, since the court cannot look beyond the record to ascertain it, and, if it did, could not in that way acquire jurisdiction.

That the parties might have made a showing upon which the case could have been removed cannot avail them if they have not in fact done so.

The rule which requires that in the federal courts all jurisdictional facts shall appear in the record, applies with even greater force to causes removed from the state courts than to

those originally commenced in the federal courts. In causes removed the federal court must look to the record not only to ascertain whether it has acquired jurisdiction, but also to determine whether another court of co-ordinate powers has been deprived of it. If, therefore, this application to remove had been made under the provisions of said section 639 of the Revised Statutes, the insufficiency of the proceeding to confer jurisdiction upon this court would be very apparent. While the application states it is made under that section, we must suppose that this statement was inadvertently made, since by that section only the defendant can remove a cause on the ground of the citizenship of the parties, while, as already seen, this application is made by the plaintiff.

We will therefore consider the application as made under the act of March 3, 1875, which permits a removal upon the application of either party. Does this act, like section 639 of the Revised Statutes, require that the record shall disclose the citizenship of the parties at the time of the commencement of the suit? The two statutes, so far as they bear upon this question, are not identical in phraseology, but are, I think, substantially identical in meaning. The language of the former is: "Any suit commenced in any state court * * * may be removed for trial, * * * when the suit is * * * by a citizen of the state wherein it is brought, and against a citizen of another state." The language of the latter is: "Any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove," etc. The words "any suit commenced," in the former act, which have been held by the supreme court to fix the time at which it must appear that the parties were citizens of different states, are identical in meaning with the words "hereafter brought," in the act of 1875. The phrases "any suit commenced" and "any suit brought" mean precisely the same thing. And so the language "when the suit is by a citizen of a state wherein it is brought, and against a citizen of another state," found in the former law, must, at least so far as the question now

under consideration is concerned, be regarded as equivalent to that in the latter act—"a controversy between citizens of different states."

The meaning in both cases is that the controversy must be between citizens of different states when the suit is commenced or brought. It follows that under the act of 1875, as well as under the previous law, a case cannot be removed from a state to a federal court, on the ground of citizenship of the parties, unless it appears from the record that at the time the suit was commenced the parties to it were citizens of different states; and, as this does not appear from the record in this case, the removal was unauthorized, and this court has no jurisdiction. The plaintiff, anticipating this ruling, has moved the court for leave to file an amended transcript. It does not appear whether this is for the purpose of amending the record of the state court so as to conform to the statute, or with a view to showing, by a more complete transcript, that the record did in fact disclose the citizenship of the parties at the time of the petition for removal. If the latter is the purpose of the plaintiff, there can be no question as to the propriety of permitting the amendment, since it is without doubt his right to correct the transcript so that it will show all that appeared of record in the state court when the order of removal was made; but if the purpose is at this time to change the record of the state court so as to show the facts necessary to authorize the removal, a question of great doubt must arise as to the right of the plaintiff, in this way and at this time, to bring his case within our jurisdiction.

It is clear that, assuming that we have before us the complete record up to the present moment, the cause has not been removed. It has remained, in contemplation of law, pending in the state court. That court might have proceeded to final judgment, notwithstanding the proceeding by which a removal has been attempted. The order of the state court purporting to remove the cause did not divest that court of jurisdiction any more than a refusal to make such an order in a case coming within the law would deprive the federal

court of jurisdiction. The question then is, can the cause be now removed?—for an amendment of the record at this time, so as to show the necessary jurisdictional facts, could be equivalent to a removal at this time. With respect to the time of removal, the statute provides that the petition therefor shall be filed in the state court “before or at the term at which said cause could be first tried.” This means, as has been repeatedly held in this circuit, the term at which by law the cause could first be tried; not necessarily the term at which the parties are ready for trial.

If it be that this term has not yet passed, a removal is still permitted by the statute; but if it has passed, the question is whether it is not too late to remove the cause, either by a new petition or an amendment of the record. This question will not necessarily arise until the amended transcript is presented, and is therefore not finally passed upon.

Leave is granted to file an amended transcript, if plaintiff still desires to do so, otherwise the cause will be remanded.

MILLER, C. J., concurs.

NOTE. See *Curtin v. Decker*, 5 FED. REP. 385, and *Beede v. Cheeney*, Id. 388.

REGISTER v. DODGE.

(Circuit Court, E. D. New York. February 16, 1881.)

1. LIABILITY OF RETIRED PARTNER—NEW FIRM.

In a suit in equity to charge the estate of a partner, who retired from the banking firm of Jay Cooke & Co. in 1871 and died in 1877, with the amount of certain deposits made with said firm in 1869—

Held, that where money is deposited with a banking firm which subsequently dissolves, and whose business is continued by a new firm, the liability of the members of the old firm continues, unless facts be shown from which an intention to accept the liability of the new firm in lieu of the liability of the old firm can be fairly inferred. If such facts be shown, the liability of a retired partner will be held to have been extinguished.

2. SAME—ACCEPTANCE BY CREDITOR OF NEW FIRM—EVIDENCE.

That where a banking firm is dissolved, and the business is carried on by a new firm which has agreed to assume the liability of the old

firm, slight circumstances only are required to justify finding the existence, on the part of a creditor of the old firm, who has notice of the dissolution and of the agreement of the new firm, of an intention to accept the liability of the new firm in place of the liability of the old.

3. SAME—SAME—SAME.

That proof of debt made by the administrator of a depositor in the bankruptcy proceedings of the new firm, setting forth the original deposit made with the old firm as a debt of the new firm, with knowledge at the time that the *old* firm of Jay Cooke & Co. had been dissolved; that the *new* firm of Jay Cooke & Co. was composed of persons not members of the old firm, and that the new firm had assumed the debt in question for the purpose of terminating the liability of the retiring partner therefor, was an adoption of the new firm as debtors by the creditor. The adoption of the new firm as debtors under such circumstances, coupled with the omission on the part of the creditor, during the life-time of the retiring partner, to indicate, by word or deed, the existence of a claim against such partner, and with a delay of five years before attempting to charge the retired partner's estate, are sufficient circumstances to justify the inference that the intention was to accept the liability of the new firm in place of the liability of the old.

4. SAME—EQUITABLE RIGHTS—LACHES.

That the right sought to be enforced by this action, being an equitable right, may be met by equitable circumstances; and where the result of unexcused delay in asserting the liability of the retired partner by the creditor has been to deprive the retired partner of the opportunity to vote as a creditor in the bankruptcy proceedings of the new firm, and, by participating in the distribution of the property of the new firm, to save himself from any loss arising out of the liability for the debt, it would be inequitable to permit such creditor, at so late a day, to charge the estate of the retired partner with liability.

In Equity.

J. O. McKeen, for plaintiff.

Thomas M. Morgan, for defendant.

BENEDICT, D. J. In this case I have listened to a reargument, and have re-examined the question upon which, as I suppose, the case turns, and my opinion remains unchanged, that the plaintiff is not entitled to recover. The earnestness of the contention made in behalf of the plaintiff has impelled me to state at length the reasons of my conclusion.

The action is a suit in equity, brought by the administrator of David Register, who disappeared in the year 1870, and is

supposed to be dead, against Harry E. Dodge, executor of Edward Dodge, for the purpose of charging the estate of Edward Dodge with the amount of certain deposits of money made by David Regester in the year 1869 with the firm of Jay Cooke & Co., of Philadelphia, of which firm Edward Dodge was then a member.

The material facts are as follows:

At the time of the deposits in question the banking firm of Jay Cooke & Co., of Philadelphia, was composed of William G. Morehead, Henry D. Cooke, Pitt Cooke, George C. Thomas, Harry C. Fahnestock, John W. Sexton, and Edward Dodge. This firm dissolved January 1, 1871. John W. Sexton and Edward Dodge then retired from the business, and a new firm was formed, consisting of the remaining members of the old firm, and two new members, Jay Cooke, Jr. and James A. Carhart. The new firm succeeded to the business of the old firm, the account with the retiring members was made up and settled, and the new firm then assumed all the obligations of the old firm, and agreed that the liability of the retiring members therefor should be terminated.

The new firm continued business until November 26, 1873, when it was adjudged bankrupt. Among the debts of the new firm, published in the bankruptcy proceedings of that firm, was the debt here sued on. In June, 1873, this debt was, without objection, proved as a debt of the new firm in the bankruptcy proceeding of that firm by the representative of David Regester.

Upon this debt so proved dividends were from time to time declared out of the assets of the new firm of Jay Cooke & Co., and the same received by the representative of David Regester. In the year 1879 the estate of the new firm was wound up under the direction of trustees, in accordance with the provisions of the bankrupt law, and the stocks then constituting the assets of the new firm were distributed among the creditors of that firm in pursuance of a scheme assented to by the creditors.

Edward Dodge died in 1877. During his life-time no claim of liability for the deposits in question was made upon him

in any form, so far as appears. In September, 1878, and prior to the distribution of the stocks by the trustees of the new firm, payment of this debt was demanded by the representative of David Register of the executor of Edward Dodge, who then denied the existence of the debt as a liability of Edward Dodge. Thereafter the representative of David Register participated in the distribution of the stocks belonging to the new firm of Jay Cooke & Co. made by the trustees thereof, and as a creditor of that firm received sundry shares of various stocks, which he forthwith, and on June 12, 1879, sold at private sale, without notice to the executor of Edward Dodge. The amount of the cash dividends received from the estate of the new firm, together with the amount realized from the sale of the stocks distributed by direction of the trustees of that firm, not being equal to the amount of the deposits made in 1869 by David Register, this action is brought by his representative to charge the estate of Edward Dodge with the deficiency.

The law of the case is not doubtful. By the deposits made in 1869 with the old firm of Jay Cooke & Co., Edward Dodge, then a member of that firm, became liable for the amount thereof. That liability continues, unless facts be shown from which an intention on the part of the creditor to accept the liability of the new firm in lieu of the liability of the old firm can be fairly inferred. The question, therefore, is whether the facts above stated are sufficient to warrant the conclusion that the liability of the new firm was so accepted by the plaintiff.

In disposing of questions of this character, courts have frequently held that, when the dissolution of an old firm has occurred, and a new firm has agreed to assume the liabilities of the old firm, but slight circumstances are required to justify finding an intention on the part of a creditor of the old firm, who has notice of the dissolution and of the agreement by the new firm, to accept the liability of the new firm in place of the liability of the old. In *Ex parte Williams*, Buck, 13, the court, speaking of such a case, say: "A very little will do." In *In re Smith, Knight & Co.* L. R. 4 Ch. App. 66,

the lord justice says: "There is no doubt whatever that if you have an old firm, and either a new partner is taken into it or a new firm constituted, and the assets are taken over by the new firm, and the customer, knowing all these things, afterwards goes on and deals with the new firm, you infer assent on his part from slight circumstances." In *In re Family Indorsement Soc.* L. R. 5 Ch. App. 118, speaking of a case very like the present, it was said: "Very slight evidence, indeed, would be required to establish that the creditor had taken the liability of the new firm instead of the old."

What, then, are the circumstances in this case tending to show assent by the plaintiff to the novation of the debt sued on? In the first place, it will be observed that from the time of the publication of this debt as a debt of the new firm of Jay Cooke & Co., the creditor—and the representative of David Regester was then the creditor authorized to collect and to discharge the debt—knew that the old firm of Jay Cooke & Co. had dissolved; that Edward Dodge and John W. Sexton had retired from the business; that a new firm had been formed, containing members who were not members of the old firm; and that such new firm had agreed to assume all the liabilities of the old firm. The creditor is also chargeable with knowledge that the purpose of this agreement made by the new firm was to relieve the outgoing parties from their liability for the debts of the old firm. The nature of the agreement itself disclosed that to be its object.

This knowledge on the part of the creditor is not without significance in ascertaining his intention. If it had been the intention of the creditor to maintain intact the then existing liability of the retired partner, such an intention would naturally have evoked from the creditor, when he came to deal with the new firm in respect to this debt, some positive expression of a purpose to avoid a substitution of the liability of the new firm in place of the liability of the old. The proofs here fail to show that any expression of such a purpose in any form escaped from this creditor.

The next circumstance deserving attention is the time which elapsed before any attempt was made to enforce the

debt as a subsisting liability of Edward Dodge. The deposits sued on came to be known at the time of the bankruptcy of the new firm of Jay Cooke & Co., in 1873. Edward Dodge lived until 1877 without the suggestion of a continuing liability on his part for this debt from any source. There is no evidence that he was insolvent or absent; and the omission to make a claim upon him in his life-time, the other members of the old firm being insolvent, is hardly consistent with the position now assumed, that there was no intention to accept the liability of the new firm in lieu of the old. Furthermore, no claim was made of the executor of Edward Dodge until September, 1878, when the estate of the new firm of Jay Cooke & Co. was substantially wound up, which seems to indicate that the making of the demand upon the executor of Edward Dodge had some connection with the result of the bankruptcy proceedings of the new firm, and gives rise to the suggestion that the intention to maintain a liability on the part of Edward Dodge was an afterthought.

In cases of this description delay in asserting the liability of an outgoing partner, when coupled with a dealing with the new firm, has often been deemed to be a circumstance tending to show an intention to discharge liability of the old. In *In re Smith, Knight & Co.* already cited, it is said: "The time which has elapsed may be more material."

The next circumstance deserving attention is of more significance. Indeed, it is one that in some of the cases has been considered to be of itself conclusive. This circumstance is that when the existence of these deposits was disclosed in the bankruptcy proceeding of the new firm, the creditor, knowing that he was dealing in respect to the assets of a new firm which had agreed to assume the debts of the old firm, for the purpose of extinguishing the liability of the old firm, adopted the new firm as his debtors for this very debt. This he did in the most formal way, by proving the deposit made by David Regester, with the old firm, as a debt of the new firm. The proof was not of a liability by reason of property or money received by the new firm, to be applied to the discharge of debts of the old firm, but the original deposits were

proved as a ground of liability. This adoption of the new firm as the debtors, coupled with the omission during the life-time of the retired partner to indicate, by word or deed, the existence of a liability on his part for the debt in question, and coupled with the lapse of time that occurred before the liability of the retired partner's estate was asserted, appears to me to be sufficient, according to the requirements of the cases already cited, to justify the inference that the new firm was adopted as debtor with the intention that the liability of the firm was to stand in place of the liability of the old.

In some of the adjudged cases less proof than is here presented has been considered sufficient to warrant a similar inference.

In *Hart v. Alexander*, 2 Mee. & Well. 489, *Follett, arguendo*, says: "If the creditor, by some positive act, adopts a new firm as his debtor, the retired partner is discharged." And Lord Abinger, in giving judgment, states as the result of the cases, that "if a new partner comes in, and an account is accepted in which the new partner is made liable for the balance, that discharges the old firm, as both cannot be held liable at once for the same debt."

In *In re Medical Invalid & General Life Assurance Society*, (*Spencer's Case*), 24 L. T. R. 455, the circumstance that the new company and the customer had treated each other as insurer and insured, was held to be "complete evidence of novation."

In *In re Smith, Knight & Co.*, already cited, the case was made by the master of the rolls to turn upon the question whether the company had been adopted as debtor. He says: "I am of the opinion there was an adoption of the company as the debtor, and that it cannot be treated otherwise. It is useless to go into cases, because it is admitted that very small things will do." The decision of the master of the rolls in that case was reversed by the court of appeal upon the ground that the circumstance from which the master of the rolls found that there had been an adoption of the company as debtor was not sufficient to warrant that conclusion; but there was no dissent from the proposition of the master of

the rolls, that an adoption of the company as debtor by the creditor, with knowledge, was a fact decisive of the case.

In *Kerwin v. Kerwin*, 2 Crompt. & Mee. 627, the opinions of Lyndhurst and Bolland proceed upon the assumption that the consent of the creditor to take the new firm as debtors would be conclusive. In *Brown v. Gordon*, 16 Beavan, 309, great stress is laid upon a fact which appears in this case also, that the partners had settled with each other, treating the debt as a debt of the new firm.

The conclusion that a novation of the debt in question was effected, and the liability of Edward Dodge therefor extinguished, is not at variance with any of the cases upon which the plaintiff relies. In *Harris v. Farwell*, 15 Beavan, 31, the creditor proved against the new firm an original obligation of the new firm, based upon money paid the new firm to the use of the creditor. The case is made to turn upon the particular form of the proof of debt. In *Hall v. Jones*, 56 Ala. 493, it is said: "Proof, if made, that the accounts against the old firm were restated against the new, would be strong evidence from which an agreement (to release the retired partner) might be inferred." In principle that is this case. The debt due from the old firm of Jay Cooke & Co. was by the creditor restated against a new firm, and that for the purpose of sharing in the distribution of the estate of a firm known to be in nowise liable for the debt, except by reason of an agreement to assume it, made for the purpose of releasing their retired partner from liability.

In *Heath v. Hall*, 4 Taunt. 352, the case put is that of proving the joint debt in the bankruptcy proceedings of one of two joint debtors, and suing the other debtor in an action at law. This is not such a case. In *Devagnes v. Noble*, (*Sleich's Case*), Merivale, 562, the question decided was whether delaying for the space of eight months after the death of one partner, and meanwhile accepting part of the debt from the surviving partners, who were liable for the whole, was evidence of the transfer of the credit to the surviving partners.

In *Daniels v. Cross*, 3 Ves. Jr. 277, the only act done, as

stated by the court, was receiving interest from the surviving partners.

In *Harris v. Lindsay*, 4 Wash. 100, the liability of the outgoing partner was clearly shown to have been extinguished, and so the court decided. It is there said (page 273) that no delay to pursue the outgoing partner, which falls short of an agreement, express or implied, to take the paying partner as a debtor, will discharge the retiring partner; and the decisive question is stated to be whether the plaintiff had conformed to the agreement made between the parties at the dissolution; and the decisive fact considered to be that the paying partner was to be credited with the notes when paid. In the present case we have an express adoption of a new and different firm as the debtors, and a credit to that firm of part payment of the debt. It is not seen that any difference arises from the circumstance that the acquiescence in the arrangement, made between the old firm and the new, for a transfer of the liability of the old debts to the new firm, occurred after the new firm had become bankrupt, and not before. No inference is created by that delay, because David Regester, the depositor, disappeared before the new firm was formed, and the existence of the deposits was not known until the bankruptcy. The representative of David Regester, upon learning of the debt and of the agreement by the new firm to assume it, had the right to take the benefit of that agreement, and to accept the new firm as debtors in place of the old firm. The acts and omissions under consideration were, in law and in fact, those of the creditor, and so they have been treated here.

I now proceed to consider this case in another aspect, which, as it seems to me, is also fatal to the plaintiff's claim.

The suit is in equity. The plaintiff applies for equitable relief, but his claim is inequitable. This plainly appears. In 1873, when the new firm of Jay Cooke & Co. went into bankruptcy, and the plaintiff was called on to act in respect to the debt sued on, it was open to him at once to assert the liability of Edward Dodge for the debt in question. Had he

then done so, and had the liability of Edward Dodge been then established, a right on the part of Edward Dodge to become a creditor of the new firm in the bankruptcy proceedings would have arisen. This was a substantial right lost to Edward Dodge by unexcused delay on the part of the plaintiff. Still more, if, instead of dealing with this debt as an existing liability of the new firm alone, the liability of Edward Dodge had been asserted and maintained before the estate of Jay Cooke & Co. was wound up, those shares of stock which the plaintiff received for this debt would have passed to Edward Dodge or his representative, with, of course, the election to sell or to hold them. It is obvious that the distribution of those stocks was not made for the purpose of enabling the creditors to turn them at once into money. That could have been done by the assignee in bankruptcy. The object of the distribution was to give the creditors an election to sell or to hold these stocks. This, too, was a substantial benefit. Its value in this case appears by the fact that the stocks distributed to the plaintiff as creditor of the new firm are now equal in value to the debt proved against the new firm by the plaintiff. The plaintiff has seen fit, without any cause assigned, to adopt a course by which the right to vote as a creditor in the bankruptcy proceeding was lost to Edward Dodge, and his representative deprived of the power to secure his estate against loss.

Having without cause delayed asserting the liability of the outgoing partners during a period of some five years, whereby the party was deprived of an opportunity to take part in the bankruptcy proceeding of Jay Cooke & Co., and to re-imburse himself from the estate of that firm, the plaintiff cannot now ask a court of equity to exercise its power in his behalf. The right here claimed is an equitable right only, and it may therefore be met by equitable circumstances. *Ex parte Kendall*, 17 Ves. 522.

I have not overlooked the fact that the defendant did at one time make demand on the representative of Edward Dodge for the payment of the debt now sued on. But this demand was not made until 1878, when the distribution of

the estate of Jay Cooke & Co. had been determined upon, and when made it was not enforced; on the contrary, the defendant's denial of liability was apparently acceded to, for the plaintiff commenced no suit at that time, and after that time received the stocks distributed by the trustees of Jay Cooke & Co., and sold them at private sale without notice.

Attention should also be called to the fact that the plaintiff makes no tender of the stocks he so received. He who asks equity must do equity. If at this late day the estate of Edward Dodge is to be charged with the debt in question, equity demands of the plaintiff that he transfer to the estate of Edward Dodge the stocks which Edward Dodge would have been entitled to receive if his liability had been asserted in his life-time. The plaintiff does not do this. All that he offers is to credit the amount of the cash dividends and the proceeds of the private sale of those stocks. Manifestly, in view of the evidence respecting the value of those stocks, it would not be for his advantage to make tender of them now. But only in that way can he do equity. Failing to do this, his prayer cannot be granted.

Let an order be entered dismissing the bill, with costs.

WILSON v. WINTER and Wife.

(*Olveritt Court, W. D. Wisconsin. ———, 1881.*)

1. MORTGAGE—UNAUTHORIZED STIPULATION.

In the absence of fraud, the mere fact that a mortgage, drawn by the agent of the mortgagor, contained an unauthorized stipulation, would not avail as a defence to its foreclosure, although the mortgagor could not read the mortgage, and the same was not read to him before execution.

2. SAME—EXECUTION ON SUNDAY—WISCONSIN STATUTE.

A mortgage executed on Sunday, without the knowledge of the mortgagee, dated, acknowledged, and delivered on the following day, is not void under the statute of Wisconsin, which imposes a fine for any labor or business done on the first day of the week.

3. SAME—SAME—ESTOPPEL.

In such case the mortgagor is estopped from showing that the mortgage was executed on a day other than that of which it bears date.

4. OPTION TO DECLARE WHOLE AMOUNT DUE—NOTICE.

Where a mortgage contains a provision that the mortgagee may, at his option, declare the whole amount due after there has been a default in the payment of interest for 10 days, such option must be declared at the expiration of 10 days, or within a very short and reasonable time thereafter.

5. SAME—SAME—SAME.

Notice of the mortgagee's option to declare the whole amount due after a default of six weeks was too late under the circumstances of this case.—[ED.]

In Equity. Suit to Foreclose Mortgage.

J. F. Ellis, for complainant.

Meggett & Teal, for defendant.

BUNN, D. J. This action is brought by the plaintiff, who is a resident of New Jersey, against the defendants, who reside in the county of Eau Claire, Wisconsin, to foreclose a mortgage for the sum of \$1,200, executed by the defendants to the plaintiff on July 8, 1878, upon certain land of the defendants. The mortgage is collateral to a bond executed by the defendants at the same time. The defendants' answer, which is under oath, sets up several defences: *First*, they deny the execution of the bond and mortgage sued upon. *Second*, they allege that they are Germans by birth, and cannot read or write the English language; that they made an agreement with an attorney and agent of the plaintiff for a loan of \$1,200 on five years' time, with 10 per cent. annual interest; that to carry out said agreement they executed, acknowledged, and delivered the bond and mortgage set out in the complaint, which had been prepared for them by the plaintiff's attorney, supposing, without reading them, that they were a bond and mortgage running five years, with 10 per cent. interest, payable annually, whereas the mortgage was, in fact, so drawn as to fall due in four years' time, and the interest was made payable semi-annually; and the mortgage also contained a provision that, in case the interest remained at any time overdue for 10 days, it should be op-

v.6,no.1—2

tional with the mortgagee to declare the whole sum due, of which provision they were ignorant when they signed the mortgage. *Third*, that the bond and mortgage were made, executed, and delivered on Sunday, the seventh day of July, 1878, instead of July 8, 1878, the day of their date, and are consequently void under the Sunday law.

There is no evidence whatever to support the first defence. There was a great deal of testimony taken in support of the the second, but it all goes but a small way to defeat the mortgage.

The defendant Johann Winter testifies that he applied to R. D. Campbell, residing at Augusta, near where defendants reside, to obtain for him a loan of money, and offered to pay him \$50 to get him a loan of \$1,200 for five years, at 10 per cent., and that Campbell agreed to get it for him; that after Campbell had arranged with J. F. Ellis, an attorney at Eau Claire, to secure the loan, and after Ellis had obtained a promise of it from the plaintiff, Campbell, who was himself an attorney, drew up the papers, and presented them to the defendants for their signatures, stating that they were all right. Defendants thereupon executed the bond and mortgage without requiring them to be read or explained to them, and not being able to read them themselves; and on the next day went to Eau Claire and consummated the loan with Ellis by delivering the papers and getting the money, without reading the bond and mortgage, or requiring any further explanation of their contents. The mortgage contains a stipulation for the payment of semi-annual interest on the first day of December and June in each year; is drawn to become due on July 7, 1882, four years from date, and contains the option clause above referred to. The testimony to show these facts is quite voluminous, but it constitutes no defence to the action. There is no evidence of any fraud. Campbell, instead of being the agent of the plaintiff, was the agent of the defendants in procuring the loan and drawing the papers; and if the defendants did not understand the stipulation contained in the bond and mortgage it was their own fault. If they did not understand the English language,

there was the greater need on their part of having the writing explained to them before they signed it; and they cannot set up their own gross negligence in that behalf to defeat a written contract, entered into with all the solemnities and formalities of law. The defendant testifies before the examiner at great length as to what the terms of the contract were as agreed upon between him and his agent, Mr. Campbell, as though it were possible to substitute that agreement in the place of the writing itself.

As to the third and last defence, I think the case made by the defendants is quite as defective and unsatisfactory.

The bond and mortgage are dated on July the 8th, which fell on Monday. The acknowledgement before J. R. Button, the justice, also bears date on that day. Button testifies that he took the acknowledgment of both the bond and mortgage on that day, in his office at Augusta; that the defendants were both present in his office at the time. He says: "I was sitting at my table where I do my business, and Mr. Winter and his wife came in, and one of his sons, (I could not say which one it was; I was busy writing, I think, at the time,) and wanted I should take the acknowledgment of some papers. They sat down, and I took the acknowledgment. I inquired of them if they signed these papers of their free will and accord. They did not appear to understand,—kind of looked around,—and their son spoke to them and told them what I said, and they turned to me, both of them, and said 'Yes.' Mr. Schroeder was present. He came in at some time which I cannot testify to. Mr. Winter and this son brought the papers there. Campbell I don't think was present. They took the papers away. It was somewhere along in the morning—from 8 to 10 o'clock. I could not say exactly. That is the correct date of acknowledgment."

William Schroeder testifies circumstantially to being present about that time when defendants came into Button's office and acknowledged some papers, but he does not know what papers, nor the exact time; but from the circumstances he testifies to it was evidently the same occasion testified to by Button. The defendants deny, under oath, going before Justice

Button at all to acknowledge the mortgage, but they and their sons all testify that they executed the mortgage at their son's house, in Augusta, on Sunday, July 7th. Campbell does not remember the day; but they all agree that defendants and Campbell went to Eau Claire on Monday, the 8th, and consummated the loan by delivering the papers to Ellis for the plaintiff, and getting the money. Ellis testifies that he also was acting as agent for the defendants in getting the loan for them.

So far as the question of acknowledgement is concerned the defendants admit the acknowledgement under oath in their answer, and are, therefore, estopped from denying it on the trial. But they allege it was done on Sunday. Besides, I think the testimony of Button and Schroeder should be taken as conclusive that the acknowledgement was made on Monday, and I so find.

As to the time of the execution, as that rests wholly on the testimony of the defendants and their family, I think I must find that it was done on Sunday; and if that fact alone makes the mortgage void, then the plaintiff, who was in New Jersey, and entirely innocent of any knowledge of the fact of defendants breaking the Sunday law in Wisconsin, must suffer in their stead, while the defendants must be rewarded for their crime in the sum of \$1,200 ready money. But I am not ready to believe that such is the law.

I think there is a general feeling among judges that the courts have gone quite far enough in holding contracts void that have been entered into on Sunday. If the question were unadjudicated I would, for one, think it going far enough to hold that where the parties are mutually guilty, the court would not lend its aid to enforce a strictly executory contract entered into on Sunday; but that when the contract is fully executed on one side, and the consideration passed, as in the borrowing of money or sale of and delivery of property, to require the defaulting party to restore the consideration and perform his agreement. According to some of the decisions, if I borrow a thousand dollars of my neighbor on Sunday, promising to return it at some future day, there is no con-

tract, either express or implied, which the courts will enforce against me to repay the amount, not even though I renew the promise on a subsequent week-day, because the contract being void there can be no affirmation, there being nothing to be affirmed. This may be, and doubtless is, from the premises assumed, logical enough, but it will not be claimed for the law, as it stands, that it metes out a very exalted species of justice. The statute simply provides that any person who shall do any labor or business on the first day of the week, except works of necessity and charity, shall pay a fine of \$10.

The law itself, for what it was intended, which was to make the doing of labor on Sunday a misdemeanor, is, as everybody knows, a dead letter on the statute book. It is too often violated by persons belonging to almost all classes, and during a residence of over a quarter of a century in the state I have never known a single prosecution under it. The statute is never invoked except by defaulting defendants, who are seeking to take advantage of their own wrong to defeat and get rid of paying a just debt. But I know of no decision, and have been referred to none on the argument of this cause, that holds a contract void because one party, unknown to the other, in the private recesses of his own home, draws up and signs a mortgage on Sunday, dates and acknowledges it on a week-day, and on a week-day consummates a contract for the borrowing of money, on the faith of the mortgage, with a person who is innocent of any knowledge that the law has been violated. Such law would indeed be a disgrace to the jurisprudence of any age or country. That is just this case, and I think it safe to say that the statute will be fully vindicated by a prosecution and fine of the offending parties in a court of justice of the peace, without punishing the innocent and rewarding the guilty by a forfeiture of the sum loaned.

The vital defect in the defendant's defence is that it is not true. The contract was not made on Sunday. The drawing up and execution of the bond and mortgage were a step necessary for the defendants to take in order to consummate

the loan. But it did not of itself constitute a contract. Nobody was bound by it, and there was no contract made until the delivery of the money and papers on Monday. Besides, the papers being dated on the 8th, which was a week-day, and the plaintiff having no reason to suppose they were not executed on that day, the defendants are undoubtedly estopped from showing that they were really executed on another day, which was Sunday, because such a proceeding would operate as a gross fraud upon an innocent party.

There is only one other question, which is whether the plaintiff is entitled to a foreclosure for the entire amount of principal and interest, the principal not being due yet by the terms of the mortgage. The first six months' interest fell due on December, 1878. It was not paid, nor has any interest ever been paid. But the notice of the plaintiff's option to declare the whole amount due was not served until February 7, 1879, some six weeks after the ten days had elapsed, during which the defendants might pay the interest before the plaintiff could elect to declare the principal due. I think this was too late, and that the option should have been declared at the expiration of ten days, or within a very short and reasonable time thereafter; and that the plaintiff's decree should be for the foreclosure of the mortgage for default in the payment of interest.

Decree of foreclosure for the plaintiff, with costs.

PECK *v.* COMSTOCK.

(Circuit Court, W. D. Wisconsin. February 18, 1881.)

1. **TAX DEED—STATUTE OF LIMITATIONS—**WISCONSIN REV. ST. § 1210.

The omission of a recital in a tax deed, under the statutes of Wisconsin, of the previous issue of an irregular tax deed, does not prevent the running of the statute of limitations.—[ED.]

Demurrer. Suit to set aside Tax Deed.

Walter S. Barnes, for complainant.

John C. Spooner, for defendant.

BUNN, D. J. This action is brought by the complainant, who resides in Michigan, to set aside and cancel a tax deed upon certain land lying in the county of Burnett, in the state of Wisconsin, upon which the plaintiff holds a mortgage executed by one William S. Patrick. The mortgage has been foreclosed, and the time of redemption has expired, but no sale has been made. The land was sold for taxes in May, 1874, for the taxes of 1873, and certificates of sale duly issued, which were afterwards duly and regularly assigned to the defendant, who, on May 31, 1877, the time for redeeming the lands from sale having expired, took out a tax deed from the clerk of Barron county, in which the lands then lay, which deed was, however, irregular and void upon its face from being sealed with the clerk's private, instead of his official, seal, as the law requires. This irregular deed was acknowledged and recorded. On August 4, 1877, the defendant, Comstock, ascertaining that his deed was irregular, applied to the clerk to have a new deed issued, without, however, complying with the statute, which requires notice of such application to be given by publication. The clerk thereupon issued a new deed, which, as a first deed, is strictly regular in form, and sufficient in all respects to convey the title in the land to the defendant, all the previous tax proceedings being conceded and alleged in the complaint to be regular and valid; but as a second deed it is irregular and void, because it does not recite, as the statute requires in such cases, the issuing of the previous irregular deed. The bill is quite specific in its allegations of the regularity of the tax proceedings up to the issuing of the deeds, perhaps for the purpose of showing that the deed sought to be set aside constitutes a cloud upon the plaintiff's title. It appears upon the face of the complaint that the time within which actions are allowed to be brought under section 1210, Rev. St., to set aside or cancel a tax deed had expired when this action was brought; and the defendant demurs to the complaint on this ground, as well as that the facts set forth are insufficient to entitle the plaintiff to relief in equity.

The question for determination is whether or not the statute

of limitations runs upon the deed. I think it does, and that the demurrer must be sustained. Within the decisions of the supreme court of Wisconsin, which I feel bound to follow on this question, I think there can be little room for doubt. It is claimed by complainant that the tax deed is void, and therefore the statute does not run upon it. But, within the cases of *Marsh v. The Supervisors*, 42 Wis. 502; *Philleo v. Hiles*, 42 Wis. 527; and *The Oconto Co. v. Jerrard*, 46 Wis. 324, the deed being void does not prevent the application of the statute. And such I understand to be the uniform holding of that court and the settled construction placed upon the statute. *Edgerton v. Bird*, 6 Wis. 527; *Lawrence v. Kinney*, 32 Wis. 281; *Wood v. Meyer*, 36 Wis. 308; *Hill v. Kricke*, 11 Wis. 442; *Knox v. Cleveland*, 13 Wis. 245; *Milledge v. Coleman*, 47 Wis. 184.

The deed in this case sought to be set aside is conceded to be perfectly regular on its face as a first deed. It is, in fact, just such a deed as the defendant was entitled to receive when he took out the irregular deed on the thirty-first of May. It is sufficient on its face, and does *prima facie* convey a complete title in fee to the land. It is only by going outside and beyond the deed itself and the record thereof that the irregularity can be shown which would avail to avoid the deed, if the inquiry had been instituted within the time when such inquiry would have been proper. See *Guest v. City of Brooklyn*, 69 N. Y. 573; *Marsh v. City of Brooklyn*, 59 N. Y. 283.

If Comstock had brought an action of ejectment to recover the lands, then it is clear that the introduction of this deed in evidence would have supported his claim of title, and that it would devolve upon the former owner to show affirmatively the irregularities which would go to render the deed void in fact. This is one of the very inquiries intended by the statute to close. The statute of limitations is one of repose, and it would answer but a poor purpose if it had no effect to cut off inquiries, the result of which would be to show that the deed was not merely voidable, but void in fact. Here the officer had full power and jurisdiction to issue a tax deed, and the defendant was entitled to one conveying full title to the land. Under the

decisions of the supreme court before the statute was passed requiring notice to be given on application for a second deed, the defendant would have been entitled to just such a deed as this, and it would have conveyed a title in fee to the land. The statute was passed requiring notice of the application to be given, and certain other formalities to be observed which were not observed in this case, and the non-observance of which it is conceded rendered the deed void in fact. But it cannot be likened to a case where there is a total want of power to issue a deed. If it were possible to conceive different degrees of voidness, it seems clear that the deed is no more void in this case than one where there has been no assessment, as in *Marsh v. The Supervisors*, or where there has been no notice of sale of the land, or where the land has been sold to raise moneys in part that constituted no portion of the tax levied, as in *Milledge v. Coleman*, 47 Wis. 184, where it was held that the statute run upon the tax deed. In all those cases it was not possible that there could be any valid tax deed on the sale, while here there could have been, as the proceedings up to and including the sale were all regular; and if the statute runs in those cases it is evident that it does in this.

In that case, which is the last expression of the supreme court on the question, the court say: "In the very recent case of *Oconto Company v. Jerrard*, 46 Wis. 317, the effect of the tax deed where the statute had run was very fully considered. In that case there was no pretence that the tax for which the deed was issued proceeded upon a regular, fair, and equal assessment of the property to be taxed. A more fundamental and fatal defect in the tax proceedings than this could not well exist since a valid assessment is the foundation of the tax. In answer to the argument that the statute was not intended to apply to such a case, and that the deed could be impeached for a radical defect, the chief justice uses this language: 'The respondents had their day to impeach the tax proceedings and avoid the tax deed; then they might have said that the groundwork was so defective that there was no tax. This they did not then do, and they

are now too late to do it. They suffered the statute to purge the tax proceedings of all defects, to raise the tax deed above impeachment. Their objections may be all well founded, but they came out of time. What the respondents might have said they cannot now say. The statute has left them like one estopped to speak the truth, because they did not speak it when they might.' That has been the construction uniformly given by this court to the statute of limitations in relation to tax deeds. It has been uniformly held in a multitude of cases that, as against the grantee of a tax deed, the statute puts at rest all objections against the validity of a tax proceeding, whether resting on mere irregularity or going to the groundwork of the tax. The statute makes a deed valid on its face *prima facie* evidence, as soon as executed, of the regularity of all proceedings from the assessment of the land inclusive to the execution of the deed, and the effect of all the decisions is that, when the statute has run in favor of the grantee, the deed becomes conclusive to the same extent. The terms of the statute bar any action to recover possession of land sold and conveyed by deed for non-payment of taxes, and the learned counsel for the respondent contends that to bring a tax deed within the statute the validity of the tax and of the sale must be established. Such a construction would go far to make the statute a dead letter. The statute was designed to protect things *de facto*, not things *de jure*. When there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power, the statute applies; and the trouble with the argument is that in such a case, saving the instances excepted by the statute itself after the statute has run, the tax deed itself conclusively establishes the validity of the tax and of the sale."

Demurrer is sustained and judgment for the defendant.

JOHNSON v. LEWIS and others.

(Circuit Court, E. D. Arkansas. ———, 1881.)

1. TRUST—PARTNERSHIP.

Where a trust is created by deed, which contemplates the purchase of municipal bonds, (the legal title to which is vested in the trustees,) by a fund raised by the sale of certificates payable to bearer, which entitles the holder to participate in the income and in the distribution of the securities by a drawing, in a mode prescribed in the deed, the relation of partners does not exist between the certificate holders.

Whether such a trust is illegal under the English companies act, 1862, *quære*.

2. NEGOTIABLE PAPER—TITLE OF PURCHASER.

The rule that the purchaser of a chattel acquires no better title than his vendor possessed has no application to negotiable paper.

The party who takes such paper before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title good against all the world.

In Equity.

Palmer & Nicholls, Tappan & Hornor, and Charles C. Waters, for plaintiff.

Eben W. Kimball, for defendants.

CALDWELL, D. J. The plaintiff was the holder of \$10,000 in negotiable bonds issued by the county of Phillips, in this state, which he placed in the hands of W. N. Coler, on the twenty-sixth day of June, 1874, "to be sold at 60 cents, and accounted for at same, less a commission of $2\frac{1}{2}$ per cent." Coler sold the bonds to the Municipal Trust, of London, England, in October, 1874, for 85 cents on the dollar, receiving a part of the price agreed to be paid therefor in cash, and the balance in certificates of the trust. Suit was afterwards brought against the county on the bonds, and judgment recovered thereon in favor of the trust, and the judgment assigned to Lewis. Thereupon the plaintiff filed this bill, in which he seeks to reclaim the bonds and their proceeds upon the alleged ground that Coler had never accounted to him for the bonds, and that he transferred them to the trust for money and certificates of stock in fraud of plaintiff's rights, of which the agents of the trust had full notice.

The trust was constituted by a deed dated the fifteenth day of December, 1873, which was made between certain parties of the first part, styled "the trustees," certain parties of the second part, called "the committee," and certain parties of the third part, called "the covenantees."

The scheme contemplated subscriptions to raise a fund for the purpose of purchasing bonds of municipalities within the United States. The bonds were to be purchased by "the committee" named in the deed, and placed in the possession of the banker of the trust by the trustees. Subscribers to the fund received certificates, payable to the bearer, which entitled the holder to participate in the distribution of the profits and proceeds of the trust investments by a drawing in a mode set out in the deed, which, in some of its features, closely resembled a lottery. The capital of the trust was fixed by the deed at £350,000. The committee of the trust purchased from Coler bonds, including those of Phillips county, valued at £217,550 12s. and 10d., for which he was paid in cash £135,000 12s. and 10d., and the remaining £82,555 was paid him in certificates of the trust, which two witnesses testify were, at the time, par or a little under. The trust was not a corporation or joint-stock company or partnership, but a trust formed by deed of settlement for the purpose of securing investments. The trustees were the legal owners of the trust property, and the business of the trust was managed by them and "the committee" created by the deed for the benefit of the certificate holders, who were strangers to each other, and who entered into no contract between themselves, nor with any trustee on behalf of each other, and were not, therefore, partners.

It is a question whether this trust was not obnoxious to the provisions of the English companies act, 1862, and illegal. According to the opinion of the master of the rolls in *Sykes v. Beadon*, Solicitors' Journal, April 12, 1879, p. 464, it was; but in *Smith v. Anderson*, reported in London Times, July 17, 1880, the court of appeal overrule *Sykes v. Beadon*.

The question is not material in this case, for in any event the certificate holders who contributed the money to purchase

and pay for the securities are in equity entitled to them, and their proceeds, to be distributed among them according to the scheme of the deed, or in some equitable mode.

The evidence shows very clearly that the bonds were purchased from Coler in good faith before their maturity, and without notice of any defect in Coler's title or authority to sell. The only witness whose testimony tends to impeach the plaintiff's title is Coler himself, who testifies that he informed one or two persons, sustaining the relation of agents or managers to the trust, that the bonds were not his property and that he had no authority to use them as he was doing. It is improbable that he made any such statement to any one when he was anxiously seeking to dispose of the bonds; and he is flatly contradicted on all points by the persons to whom he claims he made the statements, and by the members of the committee, who alone had authority to purchase bonds, and who testify they were purchased in good faith. In the written agreement entered into for the sale of the bonds to the trust, he describes himself as "a dealer in American municipal bonds," and as having the possession and control over a large number of such bonds, "which he is duly authorized to sell and dispose of," and it is not reasonable that on the eve of consummating a sale of a million and a quarter of bonds, which he had been working for months to bring about, he would make a voluntary confession of want of authority which would at once put an end to his enterprise. Besides, his conduct in the transaction is not such as to inspire confidence in his honesty or veracity. He received the bonds to sell at 60 cents, for which he was to receive 2½ per cent. commission. He sold them for 85 cents, receiving nearly 60 cents of this sum in cash, and certificates of the trust for the balance, worth at the time par or a little under, and has never paid Johnson, from whom he received the bonds for sale, a single cent. The defendants having purchased the bonds from Coler in good faith are entitled to retain them.

Mr. Story says: "If an agent is entrusted with the disposal of negotiable securities or instruments, and he disposes of them by sale or pledge, or otherwise, contrary to the orders

of his principal, to a *bona fide* holder without notice, the principal cannot reclaim them. The reason is that the principal, in all such cases, holds out the agent as having an unlimited authority to dispose of and sell such instruments as he may please." Story on Agency, § 228.

The common-law rule that the purchaser of a chattel acquires no better title than his vendor passed, has no application to negotiable paper. "The possession of such paper carries the title with it to the holder. 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title good against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession." *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. National Bank*, 21 Wall. 354. Tested by these settled rules the plaintiff's case fails.

Injunction dissolved and bill dismissed.

STATE OF INDIANA *ex rel.* RICE *v.* BALDWIN and others.

(Circuit Court, D. Indiana. February 24, 1881.)

1. ATTACHMENT—UNDER-FILING CREDITOR—RELEASE OF ATTACHED PROPERTY—LIABILITY OF SHERIFF—STATUTES OF INDIANA.

In the state of Indiana an under-filing creditor in an attachment proceeding, not dismissed of record, has a right of action against the sheriff and his sureties for the prior release of the attached property, without notice, under an agreement between the original parties to the attachment suit.—[Ed.]

Civil Action.

GRESHAM, D. J. The complaint avers that on the twenty-second day of September, 1876, Jason Wilson and Adam

Wolf began an action in attachment in the Grant circuit court against Isaac Crosslet, John B. Graves, Samuel Pugh, and Daniel Mitchell; that on the same day the writ of attachment which came into the hands of Lancaster D. Baldwin, as sheriff, was levied by him on a lot of lumber, shingles, and laths, of the value of \$5,000, the property of the attachment defendants; that on the first day of February, 1877, while the suit and attachment proceeding were still pending and undisposed of, the relator, Charles Rice, filed his complaint, affidavit, and bond in attachment, under the proceeding of Wilson and Wolf, and became entitled to the benefit of the same; that on a subsequent day Wilson and Wolf appeared in open court and dismissed their action and attachment; that thereafter, to-wit, on the twenty-sixth day of September, 1877, Rice recovered judgment against the attachment defendants on his cause of action for \$3,619.94, and at the same time obtained an order for the sale of the attached property, and an application of the proceeds to the payment of his debt; that without the authority or orders of the court Baldwin allowed the attached property to be taken from his custody and to be wasted, sold, and otherwise disposed of, and failed and refused, upon proper demand, to deliver the same to his successor in office to be sold under the order of the court; and that Baldwin and the sureties on his bond are liable to the relator for the value of the attached property.

In the ninth paragraph of their answer, after admitting the commencement of the action and proceeding in attachment by Wilson and Wolf, and the levy by Baldwin on the lumber, shingles, and laths, under the writ of attachment, as stated in the complaint, the defendants aver that before the relator filed his complaint, affidavit, and bond, and attempted to become a party to the original proceeding, Wilson and Wolf and the attachment defendants agreed that one Mitchell, the agent of the attachment defendants, should take possession of the attached property, sell the same, and apply the proceeds to the payment of Wilson and Wolf's debt; that, by direction of Wilson and Wolf and the attachment defendants, Baldwin, the

sheriff, permitted Mitchell to take possession of the attached property, sell the same, and with the proceeds, on the eleventh day of January, 1877, pay Wilson and Wolf's debt in full; that on the last-named day it was agreed by the parties, no other creditor having then become a party to the attachment proceedings, that the suit should be at once dismissed; but, by neglect, the same was not done until after the first day of February, 1877, when the relator filed his complaint, affidavit, and bond, as aforesaid, and the attached property was thus sold, the debt of Wilson and Wolf paid, and the agreement for the dismissal of the suit and attachment proceedings entered into in good faith, and without any knowledge that the relator or any other creditor intended to file thereunder.

The tenth paragraph of the answer is in substance the same as the ninth.

There is a demurrer to the ninth and tenth paragraphs of the answer.

Section 165 of the Indiana Code makes a writ of attachment a lien upon the property of the attachment defendant from the time it is delivered to the sheriff. Section 186 authorizes any creditor of the defendant, upon filing the proper affidavit and bond, to become a party to the action and attachment proceeding at any time before the final adjustment of the suit. Section 187 declares that a dismissal of the action or proceeding in attachment shall not operate as a dismissal of the action or proceeding of any subsequent attaching creditor. Section 192 declares that the money realized from the attached property, after paying all costs and expenses, shall be paid to the several creditors in proportion to the amount of their several claims.

In *Shirk v. Wilson*, 13 Ind. 129, it was held that the claims of other creditors filed under an attachment suit are liens from the time the original writ was placed in the hands of the sheriff.

The records in the clerk's office showed that Wilson and Wolf's suit in attachment was pending, and that the sheriff had levied on property of the attachment defendants when Rice filed his complaint, affidavit, and bond. The plaintiffs

neglected to dismiss their suit, as they had agreed to do, and the defendants neglected to have the suit dismissed, as they might have done. The dismissal by Wilson and Wolf, after Rice had become a party to the proceeding, had no effect on any rights which Rice had acquired. While Baldwin was not a party to the attachment suit, he was interested in having that suit dismissed before other creditors filed under it. But he neglected to inform the court of the payment of Wilson and Wolf's debt, the agreement to dismiss, and the disposition that had been made of the attached property, and Rice took the necessary steps to become an under filing creditor, and proceeded in the regular way to judgment on his claim. The court also found that the property which the sheriff had seized was subject to the lien of Rice's attachment, and ordered that it be sold to pay his debt. Baldwin and his sureties are now sued because Baldwin failed to deliver the attached property to his successor in office for execution, and the defence is an indirect attack on the order of the court.

The court could, and perhaps would, have permitted Baldwin to set up the agreement between the original attachment plaintiffs and defendants for the dismissal of the suit in opposition to Rice's motion for an order to sell the attached property and have the proceeds applied to the payment of his debt. *Adams v. Balch*, 5 Me. 188; *Drake on Attachment*, § 304. But finding that the original suit in attachment was pending on the docket, that there had been no "final adjustment" of it by dismissal or otherwise, was Rice bound to go further and inquire whether there was any private or outside agreement for its dismissal? I think not. What effect it would have had if, before taking the necessary steps to become an under filing creditor, Rice had known of the payment of Wilson and Wolf's debt, and of the agreement to dismiss the suit, is not a question now before the court. The attached property was in the custody of the court for the benefit of Wilson and Wolf, and all other creditors who saw fit to become parties to the proceeding. While the case remained on the docket, unless the defendant substituted a bond for the attached

property, Baldwin was bound to hold it, not under the orders of the plaintiffs, as in the case of an ordinary execution, but under the orders of the court, and have it forthcoming when demanded for execution. His failure to do this was a neglect of his official duty, whereby Rice acquired a right of action against him and the sureties on his official bond. The surrender of the attached property to Mitchell, by direction of Wilson and Wolf and the defendants, was of course a protection to Baldwin against them. Rice is entitled to such damages as will indemnify him for Baldwin's neglect of official duty.

Whether Rice is entitled to recover nominal damages only, or the amount of his debt, if the value of the attached property was enough to pay the debt, or an amount equal to what his *pro rata* share would have been had there been no agreement to dismiss and the property had been held for execution, need not now be decided. It is sufficient, in overruling the demurrer, to say that Rice had a right of action.

Ex parte LANE.

(District Court, D. Michigan. January 31, 1881.)

1. EXTRADITION—COMPLAINT AND WARRANT.

A complaint and warrant in an extradition case should show upon their face that the commissioner issuing the warrant is duly empowered to act in cases of that description.

2. SAME—HABEAS CORPUS.

Quære, whether the court, upon *habeas corpus*, would be bound to treat a warrant defective in this particular as null and void.

3. CANADA—JUDICIAL NOTICE.

The court may take judicial notice of the fact that the dominion of Canada is a British possession.

4. COMPLAINT—COMMON-LAW OFFENCE.

A complaint charging an offence at common law is good, notwithstanding it concludes "against the form of the statute," etc. In such case no proof of the foreign statute is required.

5. SAME—INFORMATION AND BELIEF.

A complaint made simply upon information and belief is fatally defective, and gives the commissioner no jurisdiction.

6. SAME—SAME—OFFICIAL REPRESENTATIVE.

If the person making the complaint has no personal knowledge of the facts, it should appear that he is a representative of the foreign government, acting in an official capacity, or he should produce an indictment against the party charged, or depositions tending to show his guilt, or at least set forth with particularity the sources and details of his information, that it may appear that the arrest of the party is sought upon something more than a rumor or suspicion of his guilt.

7. SAME—AMENDMENT BY COMMISSIONER—CERTIORARI.

The commissioner has no power to amend the complaint or warrant, or to supply defects by his certificate, after the case is closed and a writ of *certiorari* is served upon him to produce the record of his proceedings.

This was a writ of *habeas corpus* and *certiorari* to review the proceedings had before Darius J. Davison, United States commissioner, with reference to the application of the Canadian authorities for the extradition of the petitioner, Oliver Lane. Under the writ of *habeas corpus* the marshal returned that he held the prisoner in custody by virtue of a *mittimus* from the commissioner to await the order of the secretary of state. To the *certiorari* the commissioner returned a record of the proceedings in the cause.

A. E. Hawes, for petitioner.

J. W. Finney, Asst. U. S. Dist. Att'y, for prosecution.

BROWN, D. J. Several objections were taken to the regularity of the proceedings before the commissioner, which I proceed to consider in their order.

1. That the complaint nowhere recites the appointment of the commissioner, nor that he is empowered under the laws of the United States to entertain complaints or issue warrants in extradition cases. The complaint purports to be made by Alexander B. Baxter, of Chatham, in the province of Ontario, "who, being duly sworn, saith, that on his best knowledge, information, and belief," etc.; and purports to be sworn to before D. J. Davison, United States extradition commissioner for the eastern district of Michigan

The commissioner, however, certifies that the word "extradition" was interlined after the conclusion of the testimony, and without the knowledge or consent of the petitioner. I doubt the power of the commissioner to make this amendment at the close of the proceedings, and after his attention had been called to the defect. If this can be rightfully done, then almost any defect in the proceedings might be amended after the attention of the commissioner had been called to it. For the purpose of this case, therefore, I will treat the complaint as it stood before the amendment was made. I think that in a complaint before a commissioner, and in the subsequent proceedings before him, he ought to be described as a commissioner of the circuit court of the United States, specially authorized by said court to take cognizance of applications for extradition, or by words of similar import, since he is not authorized by virtue of his general appointment as commissioner of the circuit court to assume jurisdiction of this class of cases. Rev. St. § 5270.

In the case of *Re Farez*, 7 Blatchf. 345, objection was taken to the proceedings on the ground that the warrant did not show that the commissioner was appointed by the court to issue the particular warrant, but it did appear upon the face of the warrant that he was appointed to issue warrants in all cases of extradition falling within the acts in question, and it was held sufficient. It had been previously held, however, in a case against the same party, that a warrant which did not show upon its face that the commissioner issuing it was authorized to act in extradition cases was void. *Re Farez*, 7 Blatchf. 34; see, also, *In Re Macdonnell*, 11 Blatchf. 86.

In the case of the *United States v. Stowell*, 2 Curtis, 153, an indictment for obstructing the marshal in the service of warrant for the rendition of Anthony Burns was quashed, upon the ground that the warrant set forth simply that it was issued by a commissioner of the circuit court, without averring that he was such a commissioner, as was particularly described in the act of September, 1850; and it was further held that such defect could not be aided by referring

to the records of the court showing that the commissioner was authorized to issue the warrant. Hence, I think it should appear that the person taking the complaint and issuing the warrant is not only a commissioner of the court, but is one authorized to act in extradition cases. I should be loth, however, to hold that the proceedings were void upon this account, since I am by no means certain but that the court, upon an application for discharge upon a writ of *habeas corpus*, would be bound to take judicial notice of the fact that the commissioner had been appointed for this purpose. If a third person had been indicted for resisting a marshal in the execution of this warrant, I should have no doubt that the decision of Justice Curtis would apply, and that it would be necessary to make a more particular averment in the indictment.

Without expressing a more decided opinion upon the effect of the omission in this case, I proceed to the consideration of the next objection.

2. That although the complaint charges that said Lane committed the crime of forgery, and of uttering forged paper, at Rondeau, in the province of Ontario, there is nowhere in the proceedings any averment or proof that the province of Ontario is within the territorial domain of Great Britain. There is nothing in this objection. Undoubtedly, it should be averred and proved that the town within which the offence is charged to have been committed is within the province of Ontario; but I think the court may take judicial notice of the fact that this province is a British possession. There has been a good deal of discussion in the books as to what facts may be within the judicial cognizance, but I think a court may safely take notice of such facts as are within the knowledge of every intelligent person in the community. There is scarcely a school-boy in the state who does not know that the great dominion that lies upon the other side of the Detroit river is a part of her majesty's possessions, and it is asking too much of a judge to shut his eyes to this fact. *Peyroux v. Howard*, 7 Pet. 324, 342; *The Apollon*, 9 Wheat. 374.

3. Objection is also taken upon the ground that the offence is charged to have been committed "against the statute in such case made and provided," and that there is no proof of any statute in the province of Ontario punishing the crime of forgery. It seems to have been formerly the law that where an offence was punishable at common law only, and yet the indictment averred it to have been done against the form of the statute, it should be quashed. Later authorities, however, hold that this is mere surplusage, if the offence be in fact a common-law crime. 1 Bishop on Criminal Proceedings, § 349. Whether a party could be extradited for a forgery under a special act of the province of Ontario, which was not a forgery at common law, it is unnecessary here to determine. I have no doubt, however, that where the offence committed is a forgery at common law, the foreign government has a right to take proceedings for extradition. It may be safely assumed that there is a provincial statute punishing the common-law crime of forgery. If, however, the party were shown not to be guilty of a common-law forgery, it would be incumbent upon the prosecution to show a statute covering the offence.

4. The complaint is made upon information and belief, and in this respect I think it is fatally defective. The statute requires a complaint upon oath, and I think it is not satisfied by a simple allegation that the complainant is informed and believes the petitioner to have committed the offence, or, in the language of this complaint, that upon the "best knowledge, information, and belief" of complainant, defendant is guilty. A person may swear that he has reason to believe, and does believe, that a person has committed a crime, although his reasons may amount to little more than mere suspicion, without laying himself open to a charge of perjury. This, however, is not a complaint upon oath, within the meaning of the statute. The personal liberty of a citizen ought not to be interfered with upon an allegation so loosely framed. It is very singular that there are so few cases in which the requirements of a proper complaint upon oath are

discussed, but I think, as a general rule, a mere allegation that the complainant has reason to believe, and does believe, is insufficient. Such was the ruling in *Ex parte Smith*, 3 McLean, 135, and such, I think, is the inference to be drawn from the language of the court in *Washburn v. People*, 10 Mich. 372, in which a distinction is drawn between complaints, and jurats of a prosecuting attorney attached to informations made after preliminary examinations before a magistrate.

This is certainly the rule in analogous cases. Thus, affidavits upon information and belief alone are insufficient to authorize the arrest of a fraudulent or absconding debtor. *Smith v. Luce*, 10 Wend. 257; *Matter of Bliss*, 7 Hill, 187; *Proctor v. Prout*, 17 Mich. 473.

In cases of injunctions, the rule is that the material facts must be sworn to positively, and by a person having knowledge of such facts. *Waddell v. Bruen*, 4 Edwards, Ch. 671; *Armstrong v. Sandford*, 4 Minn. 49.

So, also, with regard to depositions attached to a petition for an adjudication of bankruptcy, it has usually been held that such depositions, as to the acts of bankruptcy, must be such as to constitute legal testimony; that the statements must be of facts, and not the mere conclusions of witnesses; and that, as a general rule, they must be of the witnesses' own knowledge, and be stated with such clearness as to leave no doubt as to their meaning. *In re Rosenfield*, 11 Bank. Reg. 86; *In re Hadley*, 12 Bank. Reg. 366, 374.

I would not undertake to say, however, that a complaint for extradition may not be made upon information and belief, for such a ruling might put it out of the power of a foreign government to obtain the surrender of a criminal in a large number of cases, without incurring a very great and unnecessary expense in so doing. For instance, in the case of *Farez*, 7 Blatchf. 345, the complaint was made by a representative of a foreign government, in his official capacity as Swiss consul. I have no doubt that if depositions have been taken in a foreign country tending to show the accused guilty of the crime, or if an indictment has been found against him,

or if the representative of the foreign government demanding his extradition has fully informed himself with regard to the particular events by conversations with persons who witnessed them, he may make a complaint upon information and belief; but, in such case, I think he should set forth with some particularity the sources and details of his information, or the grounds for supposing the defendant to be guilty; in other words, it should appear that his reasons for pursuing the defendant are based upon something more than mere rumor or suspicion of his guilt.

In the case under consideration, however, the complaint does not purport to have been made by an officer, nor does it give any reason why it is made simply upon his best knowledge, information, and belief. It is true that after the writ of *certiorari* was issued and served upon the commissioner he added a further certificate to his return, setting forth that the complainant was in fact superintendent of police, and that he exhibited to the commissioner, at the time of issuing the warrant, a complaint on oath, purporting to have been made in writing before a police magistrate, charging Lane with forgery and the utterance of forged paper, as set forth in the complaint, and the warrant issued thereon; and that he was also attended by a person who claimed to be crown attorney of the county within which the offence was committed. I do not feel at liberty, however, to take notice of a certificate thus made, after the service of the writ.

In my opinion, the complaint did not give the commissioner jurisdiction to act in this matter, and the prisoner is entitled to a discharge.

UNITED STATES v. THORNBURG.*

UNITED STATES v. WISE.

(District Court, S. D. Ohio. March, 1881.)

1. NAVIGATION LAWS—REV. ST. § 4472—CARRYING PETROLEUM ON PASSENGER VESSELS—PRACTICABLE MODE OF TRANSPORTATION.

Section 4472 of the United States Revised Statutes prohibits the carrying of petroleum and other dangerous articles upon passenger vessels, but excepts petroleum of a certain fire test upon routes where there is no other practicable mode of transportation.

Held, (1) that if there is an all-rail route over which the oil may be carried with any profit, it is a practicable mode of transportation; (2) but if the rate of freight by rail is so high as to prevent any profit upon the sale of the oil, or to destroy the trade between the points in question, it is not a practicable mode of transportation between those points.

Section 4472 of the Revised Statutes of the United States, under which these actions are brought, prohibits the carrying of petroleum, naphtha, nitro-glycerine, and other explosive and dangerous articles upon passenger vessels, but excepts from the prohibition refined petroleum of a certain fire test, upon routes where there is no other practicable mode of transportation. The case of *U. S. v. Thornburg* is a suit for penalty under this statute for carrying petroleum on a passenger steamer from Marietta to Cincinnati, and the case of *U. S. v. Wise* is for carrying it from Cincinnati to Memphis. Evidence was introduced by the government to show that there was an all-rail route between the points named, and it was claimed that it was a practicable mode of transportation, while the defence sought to prove that it was not a practicable mode, by showing (1) that the rate of freight by rail was so high as to leave no profit in the sale of the oil; (2) that the rate of transportation by rail between the points named was so high as to destroy the trade in oil between these points, inasmuch as it could be secured at a less rate from other points.

*Reported by Messrs. Florien Giaque and J. C. Harper, of the Cincinnati bar.

Channing Richards, U. S. Dist. Att'y, for plaintiffs.

Moulton, Johnson & Levy and *W. H. Jones*, for defendants.

SWING, D. J., (*charging jury*.) If there be an all-rail route over which the oil may be carried with any profit, it is a practicable mode of transportation; but, if the rate of freight by rail is so high as to prevent any profit upon the sale of the oil, or to destroy the trade in oil between the points in question,—in other words, if the rate of freight be so high as to prohibit commerce in oil between those points,—it would not be a practicable mode of transportation between those points.

I refuse to give the following charge, asked by the government: That if there be an all-rail route between the points in question, it constitutes a practicable mode of transportation, within the meaning of the statute, without regard to cost or distance.

Verdict for defendants.

UNITED STATES *v.* BAER.

(*Circuit Court, S. D. New York.* December 7, 1880.)

I. PERJURY—DEPOSITION—OATH—EVIDENCE—NEW YORK STATUTES.

Upon a trial for perjury, for having sworn falsely as to the truth of a certain deposition, the notary, who administered the oath in the state of New York, testified that there was but one legal form of administering an oath in the state, and that such form was, "Do you solemnly swear that the above affidavit subscribed by you is true, in the presence of the ever-living God;" that he "used that form substantially," but did not know whether he "put in the presence of the ever-living God;" but that he was "a little conscientious about that," and "a little careful about using it." *Held*, upon a motion for a new trial, that this testimony of the notary, coupled with the certificate given at the time to the effect that the affidavit was sworn to before him, was sufficient evidence to sustain a finding that an oath was administered to the accused.—[Ed.]

Indictment. Motion for New Trial.

BENEDICT, D. J. The defendant was indicted under section 5392 of the Revised Statutes for having taken an oath before a notary public that a certain deposition subscribed by him

was true, and wilfully and contrary to said oath therein stated material matter which he did not believe to be true. Upon a trial he was convicted, and he now moves for a new trial upon the ground that there was no evidence showing that an oath was taken.

The argument made in support of the motion is based upon the assumption that the only evidence to show that an oath was administered to the accused was the testimony of the notary that he said to the accused, "Do you solemnly swear to this affidavit, and is it true?" To which the accused replied that he did, without lifting up his hand or placing his hand upon a Bible.

Upon this assumption it has been contended that, inasmuch as no appeal to God was made either by word or deed, no oath was taken. But the assumption upon which this argument rests is unfounded. In another portion of his testimony the notary testified that there was but one legal form of administering an oath in this state, and that such form was, "Do you solemnly swear that the above affidavit subscribed by you is true, in the presence of the ever-living God?" and he then testified: "I used that form substantially. I don't know as I put in the 'presence of the ever-living God.' I am a little conscientious about that. I am a little careful about using it." *Question.* "Careful to use it?" *Answer.* "Yes." This testimony of the notary, coupled with the certificate given at the time to the effect that the affidavit was sworn to before him, is sufficient evidence to sustain a finding that an oath was administered to the accused.

The notary was an officer of the state of New York before whom an oath may be taken by virtue of section 1778 of the Revised Statutes. The statute of the state regulating the form of oath to be administered by its officers is as follows:

"Section 82. The usual mode of administering oaths now practiced by the person who swears, laying his hand upon and kissing the gospels, shall be observed in all cases in which an oath may be administered according to law, except in the cases hereinafter otherwise provided.

"Section 83. Every person who shall desire it shall be permitted to swear in the following form: 'You do swear in the presence of the ever-living God;' and, while so swearing, such person may or may not hold up his hand, in his discretion."

The notary correctly stated one form of oath prescribed by the statute, and he testified without objection that the form he gave was the only legal form. This evidence, coupled with his testimony that he is careful to use that form, and his certificate that the affidavit was sworn to, must have satisfied the jury that on this occasion he used that form. No other conclusion is consistent with the finding that an oath was taken.

The question whether an oath would have been taken if a different form had been employed was not raised by the objection to the admission of the affidavit in evidence, and is not presented by the record. If the court had been requested to instruct the jury that in order to convict they must find that the notary used the words, "in the presence of the ever-living God," and the request had been refused, such refusal would have raised the question that has been argued. But no such request was made. The case was allowed to go to the jury upon the evidence of the notary that there was but one legal form of administering an oath, and his testimony as to what he did. His testimony was sufficient to warrant the jury in concluding that on the occasion in question he used the form described by him, and, the jury having so found, their finding should not be disturbed.

The motion is therefore denied.

BLATCHFORD, C. J., and CHOATE, D. J., concurred.

UNITED STATES v. DUFF.

(Circuit Court, S. D. New York. January 24, 1881.)

1. PRACTICE—NOTICE TO PRODUCE LETTER.

Notice to produce an original letter was served upon the defendant's attorney on the afternoon of the day before the trial, at 20 minutes before 5 o'clock. *Held*, where the defendant's attorney had his office in the same town, and near the place of trial, that the notice was sufficient.

2. SAME—SAME—ENVELOPE.

The notice described the letter as enclosed in an envelope. *Held*, that the notice sufficiently indicated an intention to call for both the envelope and its enclosure.

3. LOTTERY CIRCULAR—DEPOSIT IN MAIL—EVIDENCE.

Upon the trial of defendant for having deposited a lottery circular in the mail, in reply to a letter addressed to John Duff & Co., it was proved (1) that defendant was accustomed to use the name of John Duff & Co., and sold lottery tickets under that name; (2) that defendant personally received the letter which contained the order for the circular in question, and also money to pay for two lottery tickets; and (3) that the circular was addressed to a fictitious name, known only to the defendant and the sender of the order. *Held*, under these facts, that it was competent for the jury to infer that the defendant deposited the circular.

4. SAME—ADDRESSED TO FICTITIOUS NAME—REV. ST. § 3893.

A letter containing a lottery circular, addressed to a fictitious name, was deposited in the mail. *Held*, that such letter was within the scope of section 3893 of the Revised Statutes, relating to the mailing of letters or circulars concerning lotteries.

5. SAME—DELIVERY TO FEDERAL OFFICER.

Held, further, that it did not make any difference in the act done by the defendant that the person to whom the letter was delivered was an officer of the United States.

6. SAME—JUROR—TALK ABOUT LOTTERY BUSINESS.

A juror who sat upon the trial of the defendant heard some general talk in the corridor of the court-house, before he was empanelled, about the wickedness of those engaged in the lottery business. *Held*, upon motion for a new trial, that he was not thereby disqualified.

7. WITNESS—OCCUPATION—CREDIBILITY.

The occupation of a person may always be shown as bearing upon the question of his credibility as a witness.—[Ed.]

Indictment. Motion for New Trial.

BENEDICT, D. J. The defendant was tried and convicted of having deposited in the mail a lottery circular. He now

moves for a new trial. One ground of the motion is that error was committed at the trial in admitting secondary evidence of the contents of a letter sent to the accused, without proof of sufficient notice to produce the original. The case shows that the place of business of the accused was in Nassau street, near the place of trial. It was proved that notice to produce the original letter was served upon the defendant's attorney on the afternoon of the day before the trial, at 20 minutes before 5 o'clock. The original not being produced, secondary evidence of its contents was admitted. In this there was no error. "In town cases service of notice on the attorney on the evening before the trial is in general sufficient." 2 Russ. on Crimes, 743.

Another ground of the motion is that secondary evidence was permitted to be given of the address upon the envelope of the letter sent to the defendant, when the notice to produce did not specify the envelope. But the notice to produce described the letter as enclosed in an envelope, and, we think, sufficiently indicated an intention to call for both the envelope and its enclosure. We also think that a notice to produce a letter covers the envelope of the letter.

It is further contended that the evidence was not sufficient to warrant the jury in finding that the defendant deposited the lottery circular, because the circular in question was sent in reply to a letter addressed to John Duff & Co., and there was no direct evidence that the defendant mailed it.

But it was proved that the defendant was accustomed to use the name of John Duff & Co., and sold lottery tickets under that name. It was also proved that the defendant personally received the letter which contained the order for the circular in question, and also money to pay for two lottery tickets. From these facts it was competent for the jury to infer that the defendant, who received the order for the circular and the pay for the tickets, was the person who remitted the circular and tickets, especially when it appeared that the circular and tickets were addressed to a fictitious name, known, so far as appears, only to the defendant and the sender of the order.

It is further contended that error was committed in refusing to direct an acquittal, when requested so to do, upon the ground that the letter containing the circular in question was incapable of delivery, being addressed to a fictitious name, and therefore was not within the scope of the statute creating the offence. But letters addressed to fictitious names are not incapable of delivery, as this case shows. Moreover, the statute says nothing about delivery. It deals with mailing and sending to be mailed. The words are: "No letter or circular concerning lotteries * * * shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punished," etc. The case shows that a letter containing a circular concerning a lottery was deposited in the mail. The jury found that the defendant deposited the letter with intent to have it conveyed by mail. The finding was justified by the evidence, and it brought the defendant within the scope of the statute. The letter was none the less a letter deposited in the mail for the purpose of being conveyed by mail, because at the place to which it was conveyed it was delivered to a person who was corresponding under a fictitious name. Nor does it make any difference in the act done by the defendant that the person to whom the letter was delivered was an officer of the United States. The refusal to direct an acquittal was therefore correct.

The remainder of the questions presented arose in the course of empanelling the jury. Before the jury was sworn the defendant moved to quash the panel, and, in support of the motion, read an affidavit showing that Anthony L. Comstock, who was to be a witness against him, had conversed with some of the jurymen on the panel about lottery prosecutions, and the evidence gathered by him and in his possession, and what he expected to do in the future; and that three of the jurymen drawn heard the conversation, or portions thereof. The motion was denied. At the most, the motion was equivalent to a challenge to the array. Manifestly, the facts shown afford no support to a challenge to the array. The motion to quash the panel was therefore properly denied.

The defendant then challenged one of the jurors for favor, and propounded the following questions: *Question.* "If, on the trial of this case, it becomes a question as to who should be believed, Anthony Comstock or the defendant, the defendant being proved to be in the lottery business, would you give less credit to the defendant's testimony because he is proved to be in the lottery business?" *Question.* "Would you give less credit to the testimony of any one proved to be in the lottery business than you would give to persons not in that business?" Both questions were rejected.

These questions involved the same proposition, *i. e.*, that the fact that a person is engaged in an illegal calling must not be permitted to affect his credibility as a witness—a proposition clearly untenable. The occupation of a person may always be shown as bearing upon his credibility. A person is not shown to be incompetent to sit as a juror upon the trial of a thief by showing that he would give less credit to a thief than to one engaged in an honest calling.

It was next shown in support of the challenge that the juror had heard Comstock talking to a number of persons in the corridor before the trial about the wickedness of the men in the lottery business and the injury that business was doing, and that he had certain proofs against the lottery men; but nothing was said about the defendant's case. The talk was general about lottery men and the lottery business. The remarks here alluded to were not made in the presence of any person at the time sworn upon the jury in the defendant's case, and it cannot be held that the fact of having heard, before he was empanelled, general talk about the wickedness of those engaged in an illegal occupation disqualifies a person from sitting as juror upon the trial of one engaged in such occupation who is charged with crime.

The case, as presented in the record before us, shows a further ruling upon the challenge of the juror Perkins, to support which no effort is made, and which is so palpably erroneous as to give rise to the supposition that its presence in the record may be attributed to an error in making up the case. As the record stands, the ruling alluded to entitles

the defendant to a new trial, as a matter of course. Leave is, however, given to apply to the judge who presided at the trial for a correction of the record. If no correction of the record be made, an order will be entered directing a new trial. If the record be amended, the effect of the amendment will be the subject of further consideration.

UNITED STATES v. CONWAY and another, impleaded, etc.

(Circuit Court, S. D. New York. January 24, 1881.)

1. MARSHAL—OBSTRUCTION IN PERFORMANCE OF DUTY—ARREST BY MEMBERS OF MUNICIPAL POLICE—REV. ST. § 5522.

S. having attempted to vote in the presence of a deputy marshal, under circumstances sufficient to justify the belief that he was not entitled to vote, was arrested by the latter. The escape of the prisoner having been subsequently effected through the intervention of a crowd which surrounded the marshal, and the latter having been forcibly deprived of his cane, drew a pistol, when he was at once arrested by certain members of the municipal police. *Held*, that such arrest was an obstruction of the marshal in the performance of his duty, within the meaning of section 5522 of the Revised Statutes.—[Ed.]

Indictment. Motion for New Trial.

BENEDICT, D. J. The defendants were indicted under section 5522 of the Revised Statutes of the United States, for obstructing a marshal of the United States in the performance of his duty. The facts appearing in the case are as follows: One Faser was a deputy marshal, duly appointed and assigned to duty at a polling place in the seventh election district of the seventeenth assembly district of the city of New York on the last election day. On that day a man named Shafer attempted to vote at such polling place under circumstances sufficient to justify the belief that he was not entitled to vote. The attempt was made in presence of the marshal and of a supervisor of election, who directed that Shafer be arrested. Thereupon Faser arrested Shafer for a violation of the laws of the United States, committed in his presence.

While the marshal was removing his prisoner he was surrounded by a crowd. A cane which he carried was seized hold of, and the escape of the prisoner was effected. The marshal, when deprived of his cane, drew from his pocket a pistol. The defendants, who were members of the municipal police, at once arrested him and removed him to a police station, where he was detained some four hours. Upon these facts the jury found the defendants guilty. They now apply for a new trial. The principal proposition argued in support of this application is that the court erred in not submitting to the jury the question whether the act of the marshal in drawing a pistol was not a breach of the peace.

To this proposition one sufficient answer is that no request was made of the court to have such a question submitted to the jury. Another answer is that there was no evidence sufficient to justify the jury in finding that the act of the marshal in drawing his pistol was a breach of the peace. Still another answer is that, assuming the drawing of the pistol to have been a breach of the peace, nevertheless the arrest and removal of the marshal from the polling place, under the circumstances, was an offence against the laws of the United States.

The statute under which the defendants were indicted makes it an offence for any person, whether with or without authority, power, or process from any state or municipality, to obstruct or hinder a deputy marshal in the performance of any duty required of him by law. In this instance an offence against the laws of the United States, created by section 5511 of the Revised Statutes, had apparently been committed by Shafer in the presence of Faser, the marshal. It thereupon became the duty of the marshal, by virtue of section 2022, to arrest and take into custody the offender. Accordingly the marshal did arrest the offender, and, while engaged in maintaining custody of his prisoner, he was arrested by the defendants and removed from the polling place. By the acts of the defendants, in arresting and removing the marshal, it was rendered impossible for him to maintain custody of his prisoner, or to regain that custody if the prisoner had

already escaped from his control. The act of the defendants was necessarily an obstruction and hindrance of the marshal in the performance of the duty in which he was then engaged, namely, the duty to arrest and take into custody the person who, in his presence, had attempted to vote under circumstances justifying the belief that he was not entitled to vote. The question whether the drawing of a pistol by the marshal was necessary to enable the marshal to protect his custody of the prisoner had no materiality. The material question was whether the marshal, while engaged as he was in maintaining his custody of Shafer, had been obstructed and hindered by the defendants in the discharge of that duty. So, also, the question whether Shafer had, in fact, the right to vote was immaterial, when it was shown that the circumstances under which Shafer attempted to vote were sufficient to justify the belief that he had no such right: the duty of the marshal to arrest him was made to appear.

It has been further contended that the arrest of the marshal, under the circumstances, was no offence, because the laws of the state required the defendants, being policemen, to arrest any person believed to be committing a breach of the peace, and equally made it their duty to remove the prisoner to a police station. But the law of the United States (section 5522) made it the duty of the defendants, under the circumstances, not to obstruct or hinder the marshal in an effort to maintain the custody of a prisoner duly arrested by him. This duty, created by this law of the United States, was not affected by any provision of the laws of the state. The statute of the United States says: "Whether with or without any authority, power, or process from any state or municipality;" and indicates, as clearly as language can, the intention of the legislative power to be that no authority derived from a law of the state should furnish excuse or justification for an obstruction of a marshal in the performance of a duty required of him by law. Upon the occasion in question this statute of the United States was the paramount law, binding upon policemen and all other persons. To this law the defendants owed obedience. any

authority, power, or process from any state or municipality to the contrary notwithstanding. Having been proved to have disobeyed this law, they were properly convicted.

The rulings and charge of the judge at the trial were in harmony with the views here expressed.

The views derive support from expressions used by the supreme court of the United States in *Ex parte Siebold*, 100 U. S. 371, where the court, in speaking of the same statute, and in regard to a line of argument similar to that which has been addressed to us on this occasion, say: "The objection so often repeated, that such an application of congressional regulations to those previously made by a state would produce a clashing of jurisdiction and a conflict of rules, loses sight of the fact that the regulations made by congress are paramount to those made by the state legislature; and if they conflict therewith, the latter, so far as the conflict extends, cease to be operative." And again: "The regulations of congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the state. If both cannot be performed, the latter are, *pro tanto*, superseded, and cease to be duties."

We add that an adoption of the arguments made in behalf of the defendants in this case would in effect make the execution of the laws of the United States, in regard to elections, to depend upon the will of the state, would render the marshals of the United States subject to the control of the municipal police in respect to the manner in which they should discharge their duties as to elections, and, in our opinion, would go far to nullify the law.

The motion for a new trial is denied.

DOUGLASS, Assignee, etc., v. VOGELER.*

(District Court, S. D. Ohio. February, 1881.

1. BANKRUPT LAW—SECURITY FOR ADVANCES.

A security given by an insolvent debtor, for money advanced to him at the time, is not in violation of the bankrupt law.

2. SAME—SECURITY FOR INDORSEMENTS.

And the same principle would apply to a security given for a liability assumed (*i. e.*, as an indorser) upon which money is raised for the bankrupt.

3. SAME—SAME—SECURITY SUBSEQUENTLY GIVEN—AGREEMENT FOR, NEED NOT BE IN WRITING.

And if such advancement is made, or obligation assumed, upon an agreement that the bankrupt would execute a mortgage upon certain personal property to secure such advances or such assumed liability, a mortgage in pursuance of such agreement will be valid; and it is not necessary that such agreement should be in writing.

4. SAME—EXCHANGE OF SECURITIES.

An exchange of securities is not in violation of the bankrupt law.

5. UNRECORDED CHATTEL MORTGAGE—VALID BETWEEN MORTGAGOR AND MORTGAGEE.

As between mortgagor and mortgagee, a chattel mortgage is valid without being recorded.

6. SAME—ASSIGNEE IN BANKRUPTCY—BANKRUPT—CREDITORS.

In relation to liens of this character, the assignee occupies only the position of the bankrupt, and therefore is precluded from disputing their validity.

In Bankruptcy. Exceptions to Register's Report.

Long, Kramer & Kramer, for assignee.

Butterworth & Vogeler, contra.

SWING, D. J. The petition in this case alleges that Otto Taxis, being insolvent, on the twenty-fifth day of April, 1877, executed to Frederick Vogeler, to whom he was indebted in the sum of \$1,500, and who was also liable as indorser for him, a chattel mortgage; that the mortgage was made to secure the sum of \$5,000, and was made by said Taxis with intent to give a preference to the said Vogeler, and with intent to defeat the

*Reported by Messrs. Florian Glauque and J. C. Harper, of the Cincinnati bar.

operation of the bankrupt law; and that said Vogeler, at the time the chattel mortgage was made to him, had reasonable cause to believe that Taxis was insolvent, and knew that a fraud upon the bankrupt law was intended. The plaintiff therefore prays that the mortgage may be set aside. The defendant, by his answer, admits the making of the mortgage, but denies all the other allegations of the petition, and claims that the mortgage is a valid, subsisting lien.

The case was referred to Register Ball for the taking of testimony and for an opinion therein. The register has reported the testimony and his findings. The register reports that from the evidence in the case Taxis was insolvent when the mortgage was executed, and that Vogeler had reasonable cause to believe he was insolvent, and therefore the mortgage should be set aside; and the cause is now for hearing upon the report of the register and the evidence in the cause.

The defendant claims that the conclusion to which the register arrived is erroneous. He claims that the mortgage was given in substitution of a former mortgage, and for credit and advances made in pursuance of an agreement that the mortgage should be given, and therefore it was valid, although Taxis may have been insolvent, and the defendant may have known that fact.

The evidence in the case shows that in January, 1876, Vogeler loaned to Taxis \$3,000, for which he took a chattel mortgage on the fixtures and chattels in a drug store on Broadway, and on a bottling establishment in the same place. This loan was for one year, evidenced by a note for \$3,000, and two notes for \$120 each, for the semi-annual interest at 8 per cent. It further appears that this mortgage was delivered to Vogeler, but was never recorded. When the note became due he paid one-half of it. And it further appears that about the first of April, 1877, Vogeler agreed to assist Taxis to raise money to relieve him from embarrassment by indorsing for him, and that, to secure him, Taxis agreed to give him a mortgage upon the Fifth street store property, and upon the Broadway property, which was already mort-

gaged. It further appears from the evidence that on the third day of April, 1877, Vogeler gave to Taxis a note for \$600. On the twelfth of April, three notes of Taxis to A. Wolf for \$375 each were indorsed by Vogeler; on the sixteenth of April a note for \$700; on the twenty-fifth of April a note for \$310; and on the fifth day of May, 1877, a note for \$500 was given,—making in all \$3,235. It further appears that on the twenty-fifth day of April a chattel mortgage was given, which was filed on the eleventh day of May, 1877. And it further appears that on the twenty-second day of June proceedings in bankruptcy were instituted against Taxis. The proof shows that all the notes except the note for \$700 had been paid January 3, 1878, by Vogeler. Although some of them were indorsed or drawn in the firm name of Vogeler's firm, they were paid by him. Whether the \$700 note has since been paid the evidence does not disclose.

Upon this statement of facts two questions arise—*First*, was the mortgage, as to the liabilities assumed by Vogeler for Taxis, in contravention of the bankrupt law? It has been frequently held that a security taken from an insolvent debtor, for money advanced to him at the time, is not within the inhibition of the bankrupt law. *Tiffany v. Boatman's Institution*, 18 Wall. 375.

And the same principle will apply to the security for a liability assumed upon which money is raised for the insolvent. But it is said the liability in this case was one which had been assumed prior to the giving of the mortgage, and the mortgage must, therefore, be regarded as a security for a pre-existing debt. The notes and indorsements secured by this mortgage were given before its date:—the proof shows that one was given upon its date, one after, and the balance before. But the testimony of Vogeler is clear and explicit, that before any of the notes were given it was agreed that they should be secured by a mortgage upon the specific property upon which it was afterwards given; and that before the agreement was made, that he and Taxis consulted an attorney to know whether such an agreement would be legal,

and was advised that it would be. The attorney testifies that about the middle of April he was advised by Taxis that such was the agreement, and that afterwards they came to him and he drew the mortgage for them. There is no testimony to contradict these statements. They must, therefore, be taken as true,—that this mortgage was executed in pursuance of an agreement made before the liability of Vogeler was incurred; and it would seem to be the law that a mortgage executed in pursuance of such an agreement is a valid and legal security. *Burdock v. Jackson*, 15 N. B. R. 318. *In re The Jackson Iron Manuf'g Co.* 15 N. B. R. 438, Judge Brown, after a very full review of the American and English cases, says: "I should feel no hesitation in sustaining a security given in pursuance of a valid promise made at the time of the advance to give specific security, afterwards executed; but to sustain such security given in pursuance of a promise in general terms would open the door to the very evils the bankrupt law was intended to prevent."

I think it is very clear that the true doctrine is as indicated by the judge. To sustain a mortgage upon a prior agreement to give it, it must be shown that the promise was to give a specific security, and it must have been made as the inducement upon which the advance was made. In this case, if we are to believe Mr. Vogeler, the promise was to give a definite and specific security, to-wit, to give a mortgage upon the Fifth street store, goods, and fixtures, and upon the Broadway fixtures, and that this promise was the sole inducement to make the advances; and, furthermore, that the mortgage was executed before the advances were completed; and I have no doubt, under such circumstances, that it was not necessary that the agreement to give the mortgage should have been in writing.

The case of *Loyd v. Strobridge*, 16 N. B. R. 198, is not in conflict with this opinion. In that case the promise to give security was a general promise "to give security if required." If such had been the agreement in this case, I would say without hesitation that it could not have been enforced. Again,

that promise related to real estate, and being in parol and no part performance, it could not have been enforced in a court of equity; but this related only to personal property, and would most certainly have been enforced against Taxis, otherwise it would have been a fraud upon Vogeler.

The *second* question grows out of the fact that the balance of \$1,500 due on the original loan of \$3,000, and for which Vogeler held an unrecorded chattel mortgage as security, was a part of the consideration for the mortgage now in controversy. If the unrecorded mortgage was a valid lien, it is clear that to that extent it would be simply an exchange of securities, and it is well settled that an exchange of securities is not in violation of the bankrupt law. *Cook v. Tullis*, 18 Wall. 340; *Clarke v. Iselin*, 21 Wall. 360; *Burnhisel v. Turner*, 22 Wall. 170; *Sawyer v. Turpin*, 91 U. S. 114. But it is claimed by the learned counsel for the assignee that under the statutes of Ohio the first mortgage, not having been recorded, was void as against creditors, and therefore void as against the assignee.

This presents a very important question. As between the mortgagor and mortgagee the mortgage was valid without record. It is only as against creditors that it is void. Does the assignee occupy the position of a creditor, and is it void as against him?

In *Yeatman v. Savings Institution*, 95 U. S. 766, Mr. Justice Harlan says: "The established rule is that, except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of the property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or encumbrances, whether created by operation of law, or by the act of the bankrupt, which existed against the property in the hands of the bankrupt. * * * He takes the property in the same 'plight and condition' that the bankrupt held it." But in *Casey v. Cavarack*, 96 U. S. 489, it is claimed that the supreme court has extended the

rights of the assignee to embrace such as a general creditor might have in regard to the property. In the opinion in this case no allusion is made, by the learned justice delivering it, to the case of *Yeatman v. The Savings Bank*, and the general language must be confined to the particular cases before the court.

The direct question in this case was before the supreme court in *Gibson v. Warden*, 14 Wall. 244, and Mr. Justice Swayne, delivering the opinion of the court, says: "In cases like this the assignees stand in the place of the bankrupt; his rights are their rights, and theirs, like the liens of judgments at law, are subordinate to all the prior liens, legal and equitable, upon the property in question." And again: "The statute of Ohio deprived the mortgage of effect until deposited, as to creditors, subsequent purchasers, and mortgagees in good faith. These assignees are neither." The law of this case was afterwards applied by Justice Hunt, *In re Charles Collins*, 12 N. B. R. 379, in which he held that an assignee could not impeach the validity of a mortgage which was void as against creditors on account of the omission to record it as required by state laws. *Gibson v. Warden* has neither been overruled nor doubted by the supreme court; on the contrary, I think, at the present term of the supreme court it has virtually been affirmed in *Stewart v. Platt*, 101 U. S. 731. In that case Simon Leland & Co. executed to A. T. Stewart chattel mortgages upon the furniture of the Metropolitan Hotel, situate in New York city. These mortgages were filed in New York city when the law of New York required them to be filed in the cities or towns where the individual members of the firm severally resided. After the giving of the mortgages, Leland & Co. went into bankruptcy, and their assignee filed a bill to set aside these mortgages because they were not filed as required by law; and the circuit court of the United States for the southern district of New York held the mortgages as against the assignee were invalid. The cause was taken to the supreme court, which reversed this part of the decision of the court below. The language

of the reported decision is as follows: "This court holds that although the chattel mortgages were void as against creditors because they were not filed in the proper place, they were valid as between the mortgagor and mortgagees without being filed, and that part of the proceeds of sale of the mortgage property which remained after liens of judgment creditors were discharged belonged not to the assignee in bankruptcy for purposes of his, but to the mortgagees."

This doctrine was recognized by the circuit judge of this circuit and applied in the case of *Cushing v. Horton* at the present term. The doctrine of these cases is conclusive upon this question. This mortgage, although unrecorded, was a valid lien against Otto Taxis, the bankrupt, and must be so held as against his assignee, and was, therefore, to the extent of the balance due thereon, a valid consideration for the new mortgage. But, if it were not so, the amount of liability assumed by Vogeler as consideration for the new mortgage was greater than the amount for which the property sold. The views expressed in regard to the validity of mortgages for present advances render it unnecessary to examine the question as to the insolvency of Otto Taxis at the time of the execution of the mortgages, or as to the knowledge of or cause for belief of his insolvency possessed by Vogeler, the mortgagee; thus leaving for determination the only remaining question, whether the parties in the execution and receipt of these mortgages acted in good faith or for a fraudulent purpose. From the evidence I am satisfied that the parties in the execution of both the mortgages acted in good faith, and not for any fraudulent purpose or design.

The bill will, therefore, be dismissed, and the assignee ordered to pay to the defendant the proceeds of the sale of the mortgage property after payment of costs.

OLIVER v. CUNNINGHAM and others.

(Circuit Court, W. D. Michigan. ———, 1880.)

1. BANKRUPTCY—MORTGAGE FORECLOSURE—ASSIGNEE NOT A NECESSARY PARTY.

The assignee in bankruptcy of a bankrupt mortgagor is not a necessary party defendant to foreclosure proceedings instituted prior to the adjudication in bankruptcy.

2. SAME—SAME—ASSIGNEE CAN BE MADE A PARTY.

Such assignee can, however, be made a party upon his own petition, if there should be any reason for his interposition.—[Ed.]

Eyster v. Gaff, 91 U. S. 521.

In Equity. Petition to have proceedings stayed.

WITHEY, D. J. Garret B. Hunt, one of the defendants, has filed a petition to have the proceedings in the suit stayed until the assignees in bankruptcy of Cunningham, Haines, and Robinson are made parties defendants. It appears by the petition that the three last-named defendants have been adjudicated bankrupts, and that assignees have been appointed upon proceedings in bankruptcy instituted subsequent to the commencement of this suit.

Also, that defendant Robinson has received a discharge, and that Cunningham and Haines have applied to be discharged. At the commencement of this suit the title of the lands which are the subject-matter of the bill was in defendant Cunningham, which title has devolved upon his assignees, by virtue of the proceedings in bankruptcy.

Counsel for petitioner insists that all persons who may be affected by the decree should be made parties; that such assignees would be affected by a decree in favor of complainant; and that the case cannot properly be heard, therefore, until they are made parties. Neither they, as assignees, nor the land held by them, will be concluded by the decree. Cases cited appear to sustain such views. *Anon.* 10 Paige, 20, is a foreclosure sale, where the equity of redemption or legal title passed to the defendant's assignees in bankruptcy subsequent to commencement of suit and prior to decree. Chancellor Walworth said the suit had become defective, and could not

be further proceeded in until the assignee in bankruptcy was made a party; that the assignee was not in the situation of a mere purchaser *pendente lite*, as the equity of redemption was cast upon him by law. It was followed in other cases—1 Barb. Ch. 246; 2 Barb. Ch. 596; 3 Barb. Ch. 360; 1 Sandf. Ch. 135; 3 McLean, 487—which were also cited by counsel.

If the cases referred to are to govern it, it is manifest that the assignees of the bankrupt defendant, to whom the title to any of the property involved in the suit has come, should be made parties in order to reach the interest held by them.

But, as we understand the opinion of the supreme court of the United States,—*Eyster v. Gaff et al.* 13 N. B. R. 546, 91 U. S. 521,—we are not at liberty to follow the New York cases, or the views expressed in 3 McLean.

Thomas and James Gaff in 1868 instituted suit to foreclose a mortgage against McClure. Pending the foreclosure proceedings he was declared a bankrupt upon a petition filed pending the suit, and an assignee was appointed. The decree of foreclosure and sale was rendered nearly two months after the adjudication that McClure was a bankrupt, and about a month after the appointment of the assignee.

Gaff purchased at the sale, received the master's deed, and the sale was duly confirmed. They then brought a suit in ejectment against the mortgagor's tenant, who defended on the ground that all proceedings in the foreclosure suit since the appointment of the assignee in bankruptcy were absolutely void, because he was not made a defendant.

The supreme court says: "But for the bankruptcy of McClure, by the decree and sale the title would have vested in the purchaser, and this would have related back to the date of the mortgage." The inquiry is then made, is there anything in the bankrupt law which takes the title to the premises acquired by the assignee out of this rule?

It was maintained by counsel that, because the assignee in bankruptcy is vested by the assignment under the statute with the legal title, there remains nothing from that time for the decree of foreclosure to operate on. The court, however, says: "If this be true in this case it must be equally true in

other suits in which the title is transferred *pendente lite*." The court proceeds to state the grounds of its decision, and reaches the conclusion that there is no reason why the same principle should not apply to the transfer made by a bankruptcy proceeding as to a sale and conveyance by the mortgagor pending suit; and that in neither case is the court prevented from proceeding in the suit without the person in whom the title has vested, and that the title of the purchaser under the decree would not in such case be affected. It is further said, if there is any reason for interposing, the assignee can have himself substituted for the bankrupt, or made a defendant on petition. If he chooses to let the suit proceed without such defence, he stands as any other person would on whom the title has fallen since the suit commenced.

It is said, by petitioner's counsel, *Eyster v. Gaff* is not in point, for the reason that the claim there was that the foreclosure proceedings, under which Gaff claimed title, were void for want of jurisdiction, because the assignee in bankruptcy was not made a party, and that such want of jurisdiction was sought to be set up in the ejectment suit, not in the foreclosure suit. But the court takes the broad ground, from which there appears to be no escape, that there is nothing in the bankrupt law, or in the nature of proceedings in bankruptcy, which takes the interest in the mortgaged property acquired by the assignee out of the rule which governs as to voluntary conveyances by a defendant mortgagor *pendente lite*. This is an assertion by the supreme court of the doctrine that, in effect, the parties to the suit may wholly disregard the fact that the legal title to the property in controversy has, since the commencement of the suit, become invested in an assignee of a bankrupt defendant.

Again, it would seem that defendant Hunt should have brought forward his petition at an earlier stage of the suit, if his interests required other persons to be made parties, and that he should not now be permitted, after the cause is noticed for hearing, to have the delay necessary to bring them in. I do not concede that it is his right to have them made defendants. The assignees were bound to take notice of suits

pending against the bankrupts at the time of their appointment, and had a right to appear and defend any interest represented by them in the litigation pending here or elsewhere. If they should now apply to be let in as defendants, it ought probably to be permitted, unless their laches operate to prevent, but on such terms as to proceeding in the cause and the final hearing as would produce the least delay. If defendant Hunt has a claim for contribution from the estate of the bankrupts, the defendants, or any of them, in case he is decreed liable in this suit, no reason is seen why he may not intervene in the bankruptcy proceedings as to such contingent claim, and have an order that will prevent the assets being distributed until his rights can be ascertained.

Petition denied.

FISCHER v. HAYES.

(Circuit Court, S. D. New York. January 26, 1881.)

1. CONTEMPT—FINE—JUDGMENT.

A contempt of court is a specific criminal offence, and the imposition of a fine for such contempt is a judgment in a criminal case.

2. SAME—JUDGMENT—EXPIRATION OF TERM.

The court has no power to vary such judgment after the expiration of the term at which the fine was imposed.

3. SAME—ORDER OF COURT—RECITAL.

The order adjudging the contempt need not recite the offence, where the latter is set forth with sufficient particularity in the affidavits and reports filed in the proceedings, and the order is connected therewith by sufficient reference.

4. SAME—SAME—SAME.

An order adjudging contempt for the violation of an injunction need not recite that such injunction was lawful.

5. SAME—ORDER MADE IN ORIGINAL SUIT.

In proceedings in equity between parties to the suit, for contempt in not obeying an order in the cause, the fine for such contempt can be imposed by an order made in the original suit.

6. SAME—POWER OF COURT TO MAKE SUBSEQUENT ORDER.

An order adjudging the contempt, and setting on foot a proceeding for the purpose of ascertaining what amount of pecuniary fine should be imposed therefor, and directing on what principle and by what means it should be fixed, does not exhaust the power of the court to make a subsequent order fixing the amount of the fine, and directing commitment until the same should be paid.

7. SAME—ORDER TO STAND COMMITTED.

Where a statute authorizes or prescribes the infliction of a fine, as a punishment for a contempt of court, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine is paid, although there be no specific affirmative grant of power in the statute to make such direction.—[Ed.]

In Equity. Proceedings for Contempt.

Charles F. Blake, for plaintiff.

James H. Whitelegge, for defendant.

BLATCHFORD, C. J. This suit is brought for the infringement of letters patent No. 74,068, granted to the plaintiff February 4, 1868, for an "improvement in machine for forming sheet-metal mouldings." The patent was before this court in *Fischer v. Wilson*, 16 Blatchf. 220, and was sustained in April, 1879. This suit was brought in May, 1879. On a motion made on due notice to the defendant, this court, on the fourteenth of June, 1879, issued a preliminary injunction, restraining the defendant from making, using, or selling any machine embodying the inventions described and claimed in the second and fourth claims of the patent. This injunction was served on the defendant on the same day. Afterwards a motion founded on affidavits sworn to July 18, 1879, was made before the court for an attachment against the defendant for contempt for violating said injunction. The affidavits were those of Erickson, Conolly, and Abbott, and went to show a violation of the injunction by the defendant after its service on him in the use, in making sky-light bars, of improvements covered by the second and fourth claims of the patent. The sky-light bars were made of sheet metal, and were formed and bent on a machine. The affidavits set forth the particulars of the alleged contempt charged, and were filed in court, and copies of them were served on the defend-

ant on the twenty-eighth of July, 1879. The defendant opposed the motion on affidavits, and the court made an order on the first of August, 1879, requiring the defendant to permit an inspection on the part of the plaintiff of his machinery for bending sheet metal, and of the method of bending such sheet metal used by him. The order said: "It being the object and intention of this court to enable the complainant herein to present such evidence to the court herein as will enable the complainant to make out, if the fact be so, the infringement of the patent here in suit, and a contempt of the injunction heretofore issued and served herein;" and referred it to Mr. Shields to ascertain the fact of said infringement, "if the same be so," and report his finding to the court, and ordered "that the complainant may examine before the said referee, George Hayes and all his employes and assistants, and that both parties may examine such other witnesses as they may elect to examine." The reference before Mr. Shields commenced on the twenty-ninth of August, 1879. Witnesses for both parties were examined before the referee. The defendant was examined on the part of the plaintiff, and took no objection to the propriety or lawfulness of his being examined. He was also examined as a witness on his own behalf. The report of Mr. Shields was filed January 8, 1880. This court had, on the thirtieth of June, 1879, on motion and due notice, made an order adjudging the defendant guilty of contempt by using a machine for bending sheet metal in violation of said injunction. The proceedings covered by the motion which resulted in the order of August 1, 1879, related to a violation after June 30, 1879, and the testimony before Mr. Shields and his report related to such a violation. Mr. Shields, in his report, found that the defendant had, since the order of June 30, 1879, infringed the fourth claim of the patent, and stated in detail wherein such infringement consisted. The defendant filed exceptions to the findings in the report. On all the proceedings in the case, and the testimony taken before Mr. Shields and his report, the plaintiff moved before this court, on due notice, "for an order for attachment for contempt and punishment herein, notice of v.6,no.1—5

motion for which has been heretofore served on you, and which motion has been partially heard, and was referred to John A. Shields, Esq., referee, on the first day of August, 1879." On the hearing thereon the court, on the seventh of February, 1880, made an order as follows, entitled in this cause: "A motion for attachment for contempt having come on to be heard herein, and the matter having been referred to John A. Shields, Esq., to take the testimony of and to hear the parties, and to report to the court on the question of infringement, and the said referee having reported that the defendant has used the invention described in the letters patent on which this suit is brought in violation of the injunction of the court herein since about the second day of July, 1879, and the said referee's report having been presented to this court for confirmation, and Mr. Blake having been heard for complainant, and Mr. Whitelegge for defendant, now, therefore, it is hereby ordered, adjudged, and decreed that the said report be and it hereby is confirmed. * * * And it is further ordered, that the further hearing of this motion on the question of punishment and terms go over until Friday, February 13, 1880, at the opening of court on that day." On the seventeenth of February, 1880, this court made an order as follows, entitled in this cause: "A motion for attachment for contempt herein having come on for further hearing on the question of punishment or terms on this thirteenth day of February, 1880, and Charles F. Blake, Esq., having been heard for the motion, and J. H. Whitelegge, Esq., opposed, now, therefore, it is hereby ordered and decreed, that the defendant is adjudged to have committed the contempt alleged, and that he pay, as a fine therefor, the amount of all costs, charges, and disbursements whatsoever suffered, borne, or incurred by the complainant by reason of, or on account of, the said motion, and that the question of the amount of said fine be submitted to this court on affidavits, and without argument, as follows: The complainant to serve his affidavits on the solicitor for the defendant on or before Friday, February 20, 1880; that defendant serve his replying affidavits on counsel for complainant on or

before Tuesday, February 24, 1880, and that complainant have the right to reply; and that all affidavits be filed on or before Friday, February 27, 1880." The plaintiff presented to the court two affidavits on his part, copies of which had been served on the defendant's solicitor on the twentieth of February, 1880. The defendant replied to those affidavits by an affidavit of his own, a copy of which he served on the plaintiff's solicitor on the twenty-seventh of February, 1880. Thereupon this court, on the thirteenth of March, 1880, made an order, entitled in this cause, "on motion for second attachment for contempt," and reading as follows: "This motion, having been heard on the first day of August, 1879, on affidavits and argument by counsel for the respective parties, and thereupon an order having been duly made that it be referred to John A. Shields to ascertain the fact of said infringement, if the same be so, and report his finding to this court, and upon the coming in of the report of said referee, and hearing counsel for the respective parties in support thereof and in opposition thereto, said report was confirmed; and it was then further ordered that the complainant file with the court, and serve copies on defendant, affidavits showing the expenses incurred in the prosecution of this second attachment for contempt; that defendant file and serve answering affidavits, and that complainant may reply thereto; and an amended order, and the affidavit of George Hayes, the defendant, executed on the twenty-sixth day of February, 1880, having been filed in reply to said complainant's affidavits, it is, upon consideration thereof, ordered that the defendant pay into court the sum of \$522.49, as set forth in the affidavit of Baron Higham, executed herein on the sixteenth day of February, 1880, and the further sum of \$867.50, as set forth in the affidavit of Valentine Fischer, executed herein on the twentieth day of February, 1880, amounting altogether to the sum of \$1,389.99, as a fine for said second contempt, within 30 days from the date of the entry of this order, to-wit, the twelfth day of April, 1880, and that, if not paid, the defendant stand committed till it be paid, and that, when paid, it be paid over to the plaintiff in re-imburse-

ment." On the eleventh of May, 1880, the defendant sued out a writ of error from the supreme court of the United States to reverse the said judgment convicting him of a contempt. The plaintiff moved in that court to dismiss said writ of error, and the supreme court dismissed it for want of jurisdiction on the twenty-ninth of November, 1880. The plaintiff now, on presenting to this court the mandate of the supreme court dismissing said writ, moves for an order that the said order of March 13, 1880, be carried into effect; and the defendant at the same time moves that the said order of February 17, 1880, and the said order of March 13, 1880, be declared inoperative and void, and of no effect, or that the plaintiff be perpetually restrained and enjoined from any further action or proceeding respecting the same.

It is provided by section 725 of the Revised Statutes that the courts of the United States shall have power to punish, "by fine or imprisonment, at the discretion of the court, contempts of their authority: *provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

It is contended for the defendant that to render effectual a judgment or order convicting a party of contempt, founded on his disobedience to an order of the court, three things must concur: (1) The order must be founded upon some legal or equitable right vested in the party at whose instance it is issued; (2) the order must be lawful and duly authorized at the time it issues; (3) the disobedience to it must be wilful.

It is well settled that contempt of court is a specific criminal offence, and that the imposition of a fine for a contempt is a judgment in a criminal case. *New Orleans v. Steamship Co.* 20 Wall. 387, 392. Although there has as yet been

neither an interlocutory nor a final decree on the merits in this suit, yet the order imposing the fine for the contempt was a final order or judgment as to the matter of the contempt. The last order as to that matter was made prior to the April term, 1880. Since it was made the April term, 1880, has begun and ended, and we are now in the October term, 1880. The defendant's motion has not been made till in the present term. The general power of the court over its own judgments, orders, and decrees in civil and criminal cases, during the existence of the term at which they are first made, is held to be undeniable, (*Ex parte Lange*, 18 Wall. 163, 167;) and it is further held that the power to vary a final judgment or order, at least in a case where there was jurisdiction to make it, does not exist after the term at which it was made. *Bank of United States v. Moss*, 6 How. 31; *The Bank v. Labitut*, 1 Woods, 11. In *U. S. v. Moss* it was held to be too late after final judgment and at the next term, and by motion only, to set aside a judgment on account of a supposed want of jurisdiction; and the authorities cited in that case show it to be well settled that no error of law or fact, if any, not involving jurisdiction, committed by this court in making the order now sought to be vacated, can be rectified by this court on this motion. It does not appear that any error was committed; but, for the foregoing reason, it is not necessary to discuss that question. The utmost that the defendant could claim would be to have this court consider the question of jurisdiction now, as if he were in custody for the non-payment of the fine, and were before this court on a writ of *habeas corpus*.

The foregoing views cover all the suggestions made in argument, that the defendant, in the infringement on which the order in question was based, was guided by what he understood to be the views expressed by the court in its decision in *Fischer v. Wilson*, 16 Blatchf. 220; that his infringement was, therefore, not wilful, though mistaken; that the infringement was committed by the making of sky-light bars; that the patent of the plaintiff was and is invalid, and therefore the injunction that was disobeyed was not a lawful order,

and that the amount arrived at as a fine was not proved in a proper way.

Some points are made, on the part of the defendant, which are taken by him as arising on the face of the proceedings:

(1) It is objected that the order of February 17, 1880, decrees only "that the defendant is adjudged to have committed the contempt alleged," without reciting further the offence of which he is guilty. It is insisted that this was necessary, and, further, that the order should have recited that the defendant had disobeyed a *lawful* order of the court, and was guilty of a contempt of court in so doing. The contempt alleged is set forth with sufficient particularity in the affidavits on which the motion for attachment was founded, and in the report of the referee. All the proceedings and the various orders are sufficiently connected together by reference and recital to identify "the contempt alleged," without the necessity of reciting at length in the orders the particulars of the previous proceedings. The original motion was noticed as a motion for an attachment for contempt for a violation of the injunction, and the proceedings went on to ascertain that fact. The order of August 1, 1879, on its face, referred to the matter of a contempt of the injunction, and that is the "contempt" referred to in the orders of February 7th and 17th, and "the contempt alleged" spoken of in the latter order. It was not necessary to recite that the injunction was a lawful injunction.

(2) It is urged that the fine for contempt could not be imposed by an order made in the suit, but that the order should have been made in a proceeding in the title of which the United States were made a party to the proceeding. It is said, in *The People v. Craft*, 7 Paige, 325, that in proceedings in equity between parties to the suit for contempt in not obeying the process of the court, or any order or decree in the cause, the proceedings on the attachment may be, and usually are, entitled as in the original suit, though it is not irregular to entitle them in the name of *The People* on the relation of the person prosecuting the attachment against the defendant or party proceeded against. Where the attachment proceed-

ing for a contempt is against a witness, or a person not a party to the suit, the practice is to entitle the order for attachment, and all subsequent proceedings thereon in the name of *The People* on the relation, etc. *Stafford v. Brown*, 4 Paige, 360.

(3) It is contended that, as the order of February 17th, adjudging the contempt, ordered that the defendant pay, as a fine, the amount of all costs, etc., and did not order that the defendant stand committed, etc., the order of March 13th was void, because it ordered the defendant to stand committed, etc. It is also claimed that the court exhausted its power in making the order of February 17th, and that, even if it did not, it had no power to order the defendant to be committed until the fine should be paid. The order of February 17th adjudged the guilt, and ordered that the defendant should pay, as a fine, what should, on an investigation ordered, be ascertained to be the amount of certain expenses. The order did not specify any amount as a fine. The subsequent order specified the amount ascertained on the investigation, and ordered that it be paid by the defendant as a fine for the contempt within 30 days from the order, and that if not paid the defendant stand committed till it be paid, and that when paid it be paid over to the plaintiff in re-imbursement.

It is suggested that section 725 provides for the punishment of a contempt by fine *or* imprisonment, and that, therefore, a commitment for non-payment of the fine is unlawful, because such commitment is imprisonment. There is, however, no commitment or imprisonment if the fine be paid. There is not commitment *and* fine. The punishment by a fine is fully inflicted, under the terms of the order, if the fine be paid as the order directs, and in such case there can be no commitment. So, if there be a commitment for non-payment of the fine, there must be a discharge as soon as the fine is paid. The payment of the fine is the punishment. The awarding or infliction of the fine is no punishment. The commitment is an incident of the fine. It is not, in any manner, the "imprisonment" allowed by the statute. The payment of the fine, and a commitment for not paying it, cannot co-exist. The commitment is not a separate punishment or

imprisonment added to the payment of a fine. It is in this view that it has always been held that where a statute authorizes or prescribes the infliction of a fine, as a punishment either for a contempt of court or for a defined offence, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine be paid, although there be no specific affirmative grant of power in the statute to make such direction.

In *United States v. Hudson*, 7 Cranch, 32, 34, it is said that the implied powers of fining for contempt and imprisoning for contumacy are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; that they result from the nature of courts of justice; and that, so far, our courts possess powers not immediately derived from statute. *Ex parte Robinson*, 19 Wall. 505, 510. It might properly be held that the order to commit the defendant for non-payment of the fine was a punishment ordered for contumacy or contempt in not obeying the order to pay the fine, and so a punishment for a second contempt, and not a punishment for the contempt of violating the injunction. But the order to commit was lawful on broader grounds.

In *Kane v. The People*, 8 Wend. 203, 215, it is said that where a defendant is convicted of a misdemeanor he may be committed to prison until the fine imposed on him for the offence is paid.

In *Ex parte Watkins*, 7 Peters, 568, 575, the existence of the same practice at the common law is recognized.

In *Son v. The People*, 12 Wend. 344, on a conviction for a misdemeanor a fine was imposed, with an order that the defendant stand committed until the same be paid. The court might have imposed a fine or imprisonment not exceeding six months, or both. On *certiorari* the supreme court held that the proceeding was regular; that the imprisonment awarded was no part of the punishment, but only a mode of enforcing payment of the fine; and that, if the fine was paid on the defendant's being arrested, the sentence gave no authority to imprison.

In *Harris v. The Commonwealth*, 23 Pick. 280, it is held that where, for an offence, the punishment is a fine without imprisonment, the settled rule of law is that the sentence is to pay the fine, or stand committed until that sentence be performed.

In *Wilde v. The Commonwealth*, 2 Met. 408, 411, it is said that where the statute authorizes a punishment by fine, costs may be awarded as incident, and the party convicted may be committed till such fine and costs be paid.

In *Regina v. Dunn*, 12 Ad. & Ell. (N. S.) 1026, the defendant was indicted for an offence, and convicted, and sentenced to be imprisoned for 18 months, and to give security to keep the peace for two years after the expiration of the 18 months, and to stand committed till he should give such security. The exchequer chamber, on a writ of error, held that the sentence was proper.

In the case of *Drayton and Sears*, 5 Opinions of Attorneys General, 579, cited in *In re Mullee*, 7 Blatchf. 23, they were convicted on an indictment under a statute which imposed only a pecuniary fine for the offence. A fine, with costs, was inflicted, and the court ordered them to be imprisoned till the fine and costs should be paid. They were imprisoned for four years, and then applied to the president for a pardon, and the attorney general, Mr. Crittenden, was of opinion that the president had the power, by pardon, to discharge them from prison and to remit the fine, although, by the statute, one-half of the fine was to go to a private person and the other half to a county.

In *United States v. Robbins*, 15 Int. Rev. Rec. 155, the defendant was convicted on an indictment, and sentenced to be imprisoned for a year, and to pay a fine and costs, and to stand committed until the fine and costs should be paid. After the expiration of the year's imprisonment, the fine and costs not being paid, and the defendant being still in jail, he was brought up on *habeas corpus*, and claimed that the part of the sentence which ordered him to stand committed until the fine and costs should be paid was void. The statute authorized both a fine and imprisonment. The court held that,

where a statute imposes a fine, the power to commit a person convicted of the statutory offence to jail until the fine is paid is an inherent power in the court.

In *United States v. Kellerman*, 23 Int. Rev. Rec. 202, the defendant was convicted on an indictment, and sentenced to pay a fine and the costs of the prosecution, and to stand committed until said fine and costs be paid, and to be imprisoned for one month. After the defendant had suffered the imprisonment for one month he sued out a writ of *habeas corpus*. The statute authorized the imposition of a fine and costs, and of imprisonment for a specified time, but said nothing about commitment until the fine and costs should be paid. The court held that the judgment for commitment was proper, and that, as the fine and costs had not been paid, the defendant was rightfully in custody.

The foregoing cases were not cases of contempt of court, but, as a fine for a contempt of court is a judgment in a criminal case, the same rule applies.

In *In re Mullee*, 7 Blatchf. 23, the party was fined for contempt in violating an injunction restraining the infringement of a patent, and was ordered to stand committed until the fine should be paid.

In *In re Allen*, 13 Blatchf. 271, the party had disobeyed an order of court requiring him to produce and surrender certain books and papers. He was adjudged guilty of contempt, and was ordered to deliver them up and to pay the costs, and, upon refusal, to be committed to custody by the marshal until discharged by order of the court. On *habeas corpus* it was urged that the imprisonment was illegal because it was to continue during the pleasure of the court. The court say: "When the contempt consist of a violation of the order of the court, and is a contempt not committed in its presence, and the statute does not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of the court, or until further order of court. *Green v. Elgie*, 8 Jurist, part 1, p. 187, per Denman, C. J.; opinion of Chief Justice Kent in *In re Yates*, 4 John. 317; S. C. 9 John. 395. Chief Justice Kent, in *In re Yates*,

says that as it is the established course in matters of contempt to receive the submission of the party whenever he is ready to offer it, and, on reasonable satisfaction made, to discharge him, an order to commit him during the pleasure of the court is favorable to him, for if a definite time is fixed in the sentence the court cannot alter it even on his submission. This was said in a case where the sole punishment inflicted for a contempt of court was imprisonment until the further order of the court. The principle applies *a fortiori* to the present case, where submission may be made by paying the fine, and where the commitment must terminate when the fine is paid.

In *Green v. Elgie*, above cited, also reported in 5 Ad. & Ell. (N. S.) 99, the court of review in bankruptcy ordered one Green, a party before it, to pay certain costs within four days, or, in default, to stand committed to prison. He was committed. Afterwards he sued in the queen's bench, for false imprisonment, the person on whose application he was committed and his attorney. There was a verdict against the latter. One ground urged for sustaining the verdict was that the warrant of commitment was void because it did not direct how long the party should remain in prison. The court held that in that respect there was no objection to the warrant; but it was held bad because the order on which it was founded did not adjudge a contempt, or direct anything to be done by the party to clear himself from it.

In *Doubleday v. Sherman*, 8 Blatchf. 45, a fine was imposed for contempt in the violation of an injunction, and the defendant was ordered to stand committed until the fine should be paid.

It must, therefore, be held that this court had power to order the defendant to be committed until the fine should be paid.

It is equally clear that the court did not exhaust its power by the order of February 17th. That order adjudged the contempt, and set on foot a proceeding for ascertaining what amount of pecuniary fine should be imposed therefor, directing on what principle and by what means it should be fixed. The subsequent order of March 13th fixed the amount, im-

posed it as a fine for the contempt, to be paid within a fixed time, and ordered commitment till payment. This was proper and regular.

All the points urged in favor of the motion made by the defendant fall within the foregoing considerations, and the motion must be denied. The motion of the plaintiff is granted.

FISCHER v. HAYES.

(Circuit Court, S. D. New York. January 26, 1881.)

1. EQUITY PRACTICE—REPLICATION—RULE 66.

A replication, filed without leave, after the expiration of the time prescribed by rule 66, may be ordered to stand, in the discretion of the court.

2. SAME—PROOF—RULE 69.

Testimony taken more than three months after the filing of such replication, may be admitted in evidence at the hearing, in the discretion of the court.

3. EQUITY PLEADING—SUIT FOR INFRINGEMENT—BILL.

In a suit for the infringement of a machine patent, the bill need not state what articles the defendant has manufactured by the use of the machine.

4. INFRINGEMENT—WANT OF CONSENT—PROOF.

Want of consent need not be shown in a suit for the infringement of a machine patent, where such fact was alleged in the bill and not denied in the answer.

5. LETTERS PATENT No. 74,068, granted Valentine Fischer, February 4, 1868, for an "improvement in machine for forming sheet-metal mouldings," is not void for want of novelty.

Fischer v. Wilson, 16 Blatchf. 220.

6. SAME—SPECIFICATION—CONSTRUCTION.

The expression, "all kinds of smooth mouldings," contained in the specification of such patent, should be construed to mean, "all kinds of smooth right-angled mouldings;" and the expression, "all sorts of angles," should be construed to mean, "all the kinds of square or right-angled angles" which can be made by the square dies, therein described.—[Ed.]

In Equity. Suit for Infringement.

Charles F. Blake, for plaintiff.

James H. Whitelegge, for defendant.

BLATCHFORD, C. J. This suit is founded on letters patent No. 74,068, granted to the plaintiff February 4, 1868, for an "improvement in machine for forming sheet-metal mouldings." The patent was before this court in *Fischer v. Wilson*, 16 Blatchf. 220, and was there adjudicated upon. In that case it was held that the defendant had infringed claims 2 and 4. The novelty of claims 2 and 4 was attacked. Claim 4 is in these words: "4. Arranging the female die, G, above the male die, E or F, for the purpose of keeping the female die clear, as set forth." It was construed to be a claim to the described arrangement of the two dies, so that, having such a lower male die as E or F is, the female die shall be above the male die, and thus be kept clear, resulting in keeping both dies clear, instead of having the female die below, in a position to be clogged and mar the work, even though the upper male die should clear itself; and it was held that the lower male die must be so made and arranged as to afford no chance for the collection of dirt that would destroy the perfection of the work. Even though the female die is placed over the male die, yet the Fischer invention is not found if the male die has concavities or surrounding hollows in which dirt or foreign matter can collect. With that view of claim 4 it was held, in the Wilson case, that nothing was shown which affected the novelty of that claim. Various patents were introduced on the question of novelty, with other evidence. One of these patents was the Worthen and Renwick patent, referred to hereafter. It was held that nothing which was shown affected the novelty of claim 2 or claim 4.

In the present case several questions are raised which were not brought up in the Wilson case:

(1) As to the objection that the replication to the answer was not filed until after the time prescribed in rule 66, and that then it was filed without prior leave of the court, and that the plaintiff's proofs were taken after the expiration of three months from the time the replication was in fact filed.

The order dated March 19, 1880, but actually filed and entered March 25, 1880, made on the defendant's motion to dismiss the bill for the foregoing reasons, disposed of the foregoing questions. It was an order within the power of the court to make, in the exercise of its discretion, under rules 66 and 69. The court could rightfully direct the replication filed and the proofs taken to stand, as if the proceedings had severally been had within the times prescribed, as fully as if the order of the court to that effect had been made before taking such proceedings. The record shows that as full opportunity was given afterwards to the defendant to enter objections on the record to the proofs previously taken, and to cross-examine the witnesses before examined, as if his counsel had been present when they were taken, and that he availed himself of such opportunity. The order, through some oversight, does not show on its face that affidavits were presented on the part of the plaintiff as a foundation for denying the defendant's motion and for granting the plaintiff the relief granted. Such affidavits are on file among the papers in the cause, and it clearly appears that they were presented and acted on by the court. Like affidavits were presented on like motions made at the same time in the case against Neil and the case against O'Shaughnessey and Simpson, and those affidavits are recited in the orders made at the same time, of the same tenor, in those two cases.

(2) As to the objections to the direct testimony of the witnesses MacClay and Abbott. These questions are disposed of in the decision on the separate motion of the defendant to strike out such testimony.

(3) The bill charges that the defendant "has operated and used, and is still operating and using, in the city of New York, at No. 71 Eighth avenue, a machine or machines constructed in accordance with and containing and embodying" the invention secured by the patent. The objection is taken that the bill does not state what the defendant has made by the use of the machine, or that he has made cornices with it. The patent grants to the plaintiff the exclusive right to use the

improvement patented for any purpose. The improvement is stated in the specification to be an invention relating to "a new machine for pressing mouldings for cornices, etc., from galvanized or other sheet metal." What is meant by "mouldings" is shown by the red lines in figures 2 and 3 of the drawings. They are structures resulting from round or angular bends in sheet metal. The allegation of the bill is sufficient.

(4) As to the use by the defendant, the evidence of MacClay shows that since the patent was granted the defendant has used at his places of business in the city of New York, for making sky-light bars, a machine embodying the inventions covered by claims 2 and 4 of the patent, with the female die above, and reciprocating up and down, and the male die below, not re-reciprocating, and resting on an upright standard, which was bent over at the top so as to allow metal which had been partly bent to swing down under the male die, while further bends were being made, and not have the prior bends crushed out. The male die was so arranged that no dirt could collect around it, or between it and the female die. The defendant had this machine made for himself. In the Fischer machine and in the defendant's machine only two dies are in place at a time, one upper one and one lower one. Abbott says that he saw the defendant's machine used in his factory to bend sheet metal into a sky-light bar. The evidence is sufficient to show the use of the machine in infringement of claims 2 and 4, in bending square angles in sheet metal. This is enough. Moreover, the answer admits that the defendant has a machine, and uses or operates it. A drawing of it is given by the witness MacClay. It was easy for the defendant to show, if the fact were so, that this drawing was not correct, or that the machine had not been used by him in the shape shown, to make the bends testified to in sheet-metal sky-light bars.

(5) The bill alleges that the defendant's use of the machine has been without the plaintiff's consent. This allegation is not specifically denied in the answer, nor does the answer

allege any license or consent. It is objected that the plaintiff has not proved want of consent. This was not necessary. It was for the defendant to prove consent, if anything needed to be proved on the subject.

(6) The apparatuses testified to by Philip Barkel, Axel Schiermacher, and John R. Hopkins have no bearing on the plaintiff's patent. They are not alluded to in the brief for the defendant. They show no organized machine with a concave upright standard, on the top of which a male die is placed, and they show no male or female die, and the defendant's expert, Mr. Renwick, gives no testimony in regard to them.

(7) The machine testified to by Ristine and Brand was a corrugating machine, and was incapable of making the structure shown in the drawings of the plaintiff's patent. It is not shown ever to have been used in bending a square angle in sheet metal. It is not shown to have been ever used with only two dies at a time,—one above and one below,—with the lower die arranged as in the plaintiff's machine. The testimony given by Renwick and Ristine as to the machine, and the model of it, was properly objected to on the ground that the use of the machine was not set up in the answer.

(8) As to the Peltier patent, Mr. Renwick admits that a change would have to be made in the apparatus shown by figure 10, in order to do the work shown in the drawings of the plaintiff's patent. It is plain that this change is material. It is also clear that figure 8 does not show an apparatus anticipating claim 4 of the plaintiff's patent, and that figure 10 does not show an apparatus anticipating either claim 2 or claim 4 of that patent.

(9) The Byrne book, pages 186 and 187, does not show the plaintiff's invention as to either claim.

(10) The only defence on the question of novelty, pressed with any force, is the alleged prior use, in such a way as to anticipate the plaintiff's patent, of a machine made under the patent to W. E. Worthen and H. B. Renwick, before referred to. That patent was granted July 5, 1859, for an "improve-

ment in corrugating sheet metal." The specification of the patent describes the then existing mode of corrugating sheets of metal by means of properly-shaped male and female dies extending over the sheet, and between which the sheet is placed. The dies are then made to approach each other. The creeping of the metal to supply sufficient surface to conform to the curves and angles of the mould is resisted by the friction of the bent metal sliding over the faces of the dies, and by the force required to bend the metal from the shape it has already taken into the shape of the next succeeding corrugation. The power required is enormous, and the metal ceases to creep and stretches, and is injured, weakened, or torn apart. The new device was to corrugate by properly-shaped dies acting in succession on different parts of the sheet. The method is described thus in the specification: There is a lower or female die, whose cross-section is the form desired in the finished sheet metal, and it does not differ from those then in use. A set of upper dies is then procured, whose acting surfaces, when properly arranged, will constitute a single surface, conforming in shape to one side of the finished sheet. They are arranged so as to be free to move towards and away from the under die and be properly guided. In using the machine the sheet is laid loosely on the lower or bed side, and then one of the upper dies is forced down on it until the metal takes the proper shape. That die is then left down, and the next die in succession in the series is brought down and left down, and so in succession until the operation is finished. The metal can thus creep and conform to shape. It is apparent that this arrangement, as described, does not contain the plaintiff's invention, although the specification speaks of using the apparatus for corrugating mouldings for the cornices of large buildings. The claim of the patent is this: "The method of corrugating or moulding sheet metal by several dies acting in succession, substantially in the manner specified, upon a sheet resting upon a bed, die, or dies, so as to cause the metal to conform to shape, substantially in the manner herein described." The patent-

ees state, in the specification, that they "intend at times to use a sectional lower die in connection with sectional upper dies, acting in succession, as a convenient method of obtaining several distinct patterns from a comparatively small number of dies, and for other purposes." But this suggestion does not meet the invention embodied in claim 4 of the Fischer patent.

Mr. Worthen testifies, however, that he made a machine for Althouse & Co. in which the upper die was stationary and the lower die moved up, the female die being sometimes above and sometimes below. He also testifies that in the machine he made for Althouse & Co., under the patent, the dies were generally in gangs, but the last right-angled bend was sometimes put in with a single set of dies, one above and one below,—the female above and the male below,—both detached from the dies which made the other bends. He also says, elsewhere, that the top die was fixed, and a lower sectional die was raised against it, and then clamped up and left, and the bed plate let down and other lower sectional dies raised in succession, and left up; that when two dies were used singly, one above and one below, the upper one was fixed and the lower one was raised up against it, the upper die being the female die and the lower die the male die, and the sheet of metal being placed on the latter. This machine, he says, was ultimately sold for old iron. He says that cornices made by the method thus described were put upon two buildings which he names. Mr. Henry B. Renwick, the other patentee, and the same person who is the expert for the defendant, says that the machine he saw at Althouse & Co.'s was built in accordance with the Worthen and Renwick patent, and that the upper die and the lower die were both in sections; that he has no distinct remembrance of ever having seen the machine operated with only one male die and one female die in it, though it was capable of being operated with one pair of dies only, and with the female die uppermost; and that, when used with several dies in it, some of the female dies were uppermost and some lowermost. Mr. Renwick does not assert that in view of the

use of female dies above male dies; as so testified to by him, in the Worthen and Renwick machine, and of what is found in the Byrne book, there was not invention in claim 4 of the Fischer patent; and he, in substance, admits that if claim 4 is limited to the use of a single upper female die above a single lower male die, the invention in claim 4 did not exist in the machine which Althouse & Co. had, unless that machine was used in the way testified to by Mr. Worthen. He also testifies that so far as he remembers the upper set of dies in that machine was the stationary set.

The statement that, in the machine referred to, the lower dies were carried up singly against the upper die, is contradicted by four workmen, Pressler, Emerson, Handmann, and Engleman, who used the machine at Althouse & Co.'s. Pressler has been in the employ of Althouse & Co. for the past 28 years, and foreman for them for the past 16 years. He says that even when the lower die was made in pieces or sections, so that a difference could be made in the height of the cornice, the lower sections were bolted together and were always elevated together, and one section of the lower die could not be used alone; that a single male die was never used under a single female die; that a sectional top die was wedged down to make the bend, and then the whole lower die was raised up against it, and then that sectional top die was fastened to the lower die, and the lower die was let down, carrying that top die, and then a second sectional upper die was operated with in the same way, and so on; and that the female die was below. Emerson, a machinist, who has been in the employ of Althouse & Co. for 22 years, and built the machine referred to under Worthen's superintendence, says that the lower die was generally in sections, and the upper dies were in sections; that the lower sectional dies could not be moved up singly, but were bolted together; that the lower die was moved up; that one at a time, and sometimes two at a time, of the upper sectional dies were dropped down, to bend with; that he never knew of a single female die used above a single male die on the machine, to make the last right-angled bend.

but such bend was made with a mallet; that he does not recollect the use of a single lower male die without any other form of bend or angle on the face of the lower die; and that when a single upper sectional die had been let down and used to bend, it was clamped to the lower die, and another sectional upper die was then used. Handmann, a house-smith, worked for Althouse & Co. for 13 years, and while they had this machine, which he assisted in making. He says the upper dies were sectional, and were used in succession, by letting one down at a time, and bending with it, by bringing up the lower die against it, and then the upper die was clamped to the lower die and went down with it; and that a single male die was never used under a single female die. Engleman, a house-smith, has worked for Althouse & Co. for the past 21 years. He worked on this machine. He says he never saw used in it a single male die under a single female die, there being nothing by the side of the male die. The testimony of Bohne and Sellman goes, also, to contradict Worthen as to the way in which the last right-angled bend was made in the specific cornices referred to by Worthen.

It must be held that the defence sought to be established by the testimony of Mr. Worthen is not made out.

(11) Objection is made to the specification of the plaintiff's patent because it states "that but two kinds of dies for all kinds of smooth mouldings that may have to be formed are needed, viz., rounded and square dies," and that "of the latter but one set is required for making all sorts of angles." No such defence is set up in the answer; but the specification is not open to the objection made. Of course, a square or right-angled die will not make a bend of a different angle. There is nothing in the specification to indicate that the patentee contemplated making any angular bend other than a right-angled bend. The drawings show no other. But they do show right-angled bends in contrary directions on the same moulding. The expression, "all kinds of smooth mouldings," means, in respect to angular mouldings, "all kinds of smooth right-angled mouldings," and the expression, "all sorts

of angles," means "all the kinds of square or right-angled angles" which can be made by the square dies, and which are shown in figures 2 and 3; the mouldings shown in those two figures in red lines being the mouldings which the specification states the machine is to form. The only angles in the mouldings in those two figures are right angles.

(12) It is not apparent for what purpose the testimony of Kittredge was introduced. No defence to which it can relate is set up in the answer. It is not referred to in the brief of the counsel for the defendant. No defence of laches or license, or acquiescence by the plaintiff in the use of the machine by the defendant, is set forth in the answer. The plaintiff's patent was granted in February, 1868. He began his suit against Wilson in May, 1869. It was not decided until April, 1879. The defendant's machine was made in 1872. This suit was brought in May, 1879.

(13) The inventions covered by claims 2 and 4 of the plaintiff's patent were new, useful, and patentable.

All the questions raised and discussed on the part of the defendant have been carefully considered, and such of them as have not been particularly adverted to in this decision have not been overlooked; but they are of such minor importance that they can have no weight to control or modify the views before expressed, and therefore it is not deemed necessary to comment upon them.

There must be a decree for the plaintiffs as to claims 2 and 4.

FISCHER v. HAYES.

(Circuit Court, S. D. New York. January 26, 1881.)

1. MOTION TO STRIKE OUT TESTIMONY.

Motion to strike out testimony upon the grounds (1) that said testimony, and the oaths thereto, are fictitious and void; (2) that the direct testimony of said witnesses is fraudulent and inoperative; and (3) that said testimony is unauthorized, and does not properly form any part of the record, or of the proofs, *denied*, under the circumstances of the case.—[Ed.]

In Equity. Suit for Infringement.

Charles F. Blake, for plaintiff.

James H. Whitelegge, for defendant.

BLATCHFORD, C. J. This is a motion by the defendant to strike out the testimony of John D. MacClay and that of Phillips Abbott, taken in this case for final hearing, on the grounds set forth in the notice of motion: (1) That said testimony and the oaths thereto are fictitious and void; (2) that the direct testimony of said witnesses is fraudulent and inoperative; (3) that said testimony is unauthorized, and does not properly form any part of the record, or of the proofs herein.

The affidavit for the motion, made by Mr. MacClay December 7, 1880, is to the effect that on the eighteenth of March, 1880, the day his direct testimony purports to have been taken, he went to the office of Mr. Blake, the plaintiff's solicitor, and there Mr. Abbott read to him a paper, but presented to him no drawing, and asked him to sign the paper, and he signed it; and he was then taken by Mr. Conolly before Mr. Shields, the examiner, and was sworn by Mr. Shields to tell the truth and the whole truth, the paper not being present, but being retained by Mr. Abbott; and that he did not after that give any deposition or return to Mr. Blake's office. He also says that when Mr. Abbott so read the said paper to him he did not read any questions to him, and he did not make any of the answers purporting to have been made by him. His explanation is that what was so read to him was in narrative form, and he thought it was an

affidavit. The testimony referred to is in the form of questions and answers, and in reply to question 13 Mr. MacClay explains a drawing then produced and shown to him, and stated to be offered in evidence, and marked as an exhibit. Mr. MacClay also states that when he was cross-examined by the defendant's solicitor, on the thirty-first of March, 1880, he thought the cross-examination related to affidavits he had made in this case in 1879. It is stated in the heading of the direct examination that MacClay was first duly sworn. At the end of the direct examination is a jurat signed by Mr. Shields, the examiner, to the effect that it was sworn to before him March 18, 1880. The defendant's solicitor was not present at the direct examination, he having intentionally remained away, though notified, on the ground that he regarded the proceeding as irregular. As he was absent, it was not unnatural that Mr. MacClay, a layman, should not understand that he was being examined as a witness in chief for final hearing. It appears, by the files of this court, that he had sworn to an affidavit in this suit before Mr. Abbott, as a notary public, on the twenty-third of May, 1879, and to another affidavit in this suit before him on the twelfth of June, 1879.

Mr. MacClay's recollection on the seventh of December, 1880, as such recollection appears in his affidavit of that date, in narrative form, as to what occurred at Mr. Blake's office on the eighteenth of March, 1880, is very different from what appears from his cross-examination on the thirty-first of March, 1880, to be his then recollection of those occurrences, if such cross-examination is to be taken as referring to what occurred on the eighteenth of March, 1880, and not to what occurred on one or the other of the occasions when he made the affidavits in 1879 before Mr. Abbott. Mr. MacClay says that he did not understand he was being cross-examined as to his deposition of March 18, 1880, but thought he was being cross-examined as to his affidavits of 1879. It is plain that Mr. Whitelegge, who cross-examined him, thought he was cross-examining him as to what occurred on March 18, 1880, and probably the plaintiff's solicitor must have so thought. Mac-

Clay was then and there shown his signature at the end of the 18 direct questions, and he identified it; but a perusal of all the questions and answers on cross-examination leads to the conclusion that MacClay may very well have thought that he was being cross-examined in reference to the occasion when he swore to his affidavit of May 23, 1879, before Mr. Abbott. This is, however, of no importance to the merits of the motion. It is shown very clearly and fully, by the affidavits produced in opposition to the motion, that the direct examination of Mr. MacClay was regularly taken, in proper form, and in a proper manner, on the eighteenth of March, 1880, on prior notice to the defendant's solicitor, but without his presence, as before stated, and that the usual oath was administered to Mr. MacClay by Mr. Shields, the examiner, before the witness was examined. The jurat, bearing date March 18, 1880, at the close of the direct examination, signed by Mr. Shields, was not put there till after that day; but that is immaterial.

The drawing on tracing cloth, marked "Complainant's Exhibit; MacClay, J. A. S., examiner; marked by examiner, March 31, 1880, *Fischer v. Hayes*," is shown to be the identical drawing deposed to by MacClay, in his answer to direct question 13. It is precisely like the copy now produced, made by Hyde, March 25, 1880. Hyde and Mr. Whitelegge are shown to be mistaken in their idea that the drawing was made on yellow Manilla paper.

Mr. Whitelegge sets forth in his affidavit that the direct testimony of the witness Abbott was prepared for the occasion, and was not taken in the usual manner or at the time it purports to have been taken, and is fictitious; and that the testimony of Mr. Abbott purports to have been begun and terminated on the thirty-first of March, 1880, whereas his direct testimony was in part put in on the eighteenth and nineteenth of March. Any erroneous impression in this respect arises from the order of printing, and from the order in which the manuscript sheets of the testimony are put together. A reference to those sheets shows that the direct testimony of Mr. Abbott was begun on the eighteenth of

March and concluded on the nineteenth. It is shown that the direct examination of Mr. Abbott was regularly taken, on an oath previously administered to him by Mr. Shields, and that the allegations made by Mr. Whitelegge against his testimony are groundless.

The swearing of Mr. MacClay again on the eighth of April, 1880, after the close of his cross-examination, is fully explained.

The motion is denied both in this case, and, in so far as it may be considered as made, in the cases against Neil and against O'Shaughnessey.

FISCHER v. NEIL.

(Circuit Court, S. D. New York. January 26, 1881.)

1. EVIDENCE—WAIVER OF OBJECTION.

If no objection is made upon the record to the admission of hearsay evidence, such objection will be considered as waived.

2. SAME—GENERAL OBJECTION.

A general objection will not be considered if no particular ground of objection is specified.

3. SAME—SPECIFIC OBJECTION.

If a ground of objection is stated, all grounds not specified are considered as waived.

4. JURISDICTION—CITIZENSHIP.

Any issue as to citizenship is immaterial where the subject-matter confers jurisdiction.

5. PATENT—PRESUMPTION OF OWNERSHIP.

In a suit for infringement the patentee will be presumed to be still the owner, where no assignment has been alleged or proved.

6. LETTERS PATENT No. 74,068, granted to Valentine Fischer, February 4, 1868, for an "improvement in machine for forming sheet-metal mouldings," are shown to be *infringed*, as to the fourth claim, by the evidence in this case.—[Ed.]

In Equity. Suit for Infringement.

Charles F. Blake, for plaintiff.

James H. Whitelegge, for defendant.

BLATCHFORD, C. J. The decision of this court on final hearing, on pleadings and proofs, in the case of the same plaintiff against George Hayes, disposes of all material questions in this case except that of infringement. As to that, the bill alleges that the defendant "has operated and used, and is still operating and using, in the city of New York, state of New York, and within the southern district of New York, a machine or machines, constructed in accordance with and containing and embodying the said invention, so secured to your orator as aforesaid." The testimony of Mr. Abbott shows that he saw at the defendant's shop, June 19, 1879, which was four days before the bill was sworn to, and five days before it was filed, a machine for bending sheet metal, of which he produces a drawing. He also describes the construction and mode of operation of the machine and the dies he so saw. It is clear that to make or use such a machine in the way described, to bend sheet metal, infringes the fourth claim of the plaintiff's patent. Mr. Abbott says that at the time of his said visit he was informed by a gentleman, who represented himself as the foreman of the defendant's shop, that this machine had been used whenever required, for bending sheet metal for cornices and similar work, ever since he had been there, "which, I think, he said was about two years." No objection was made on the record to this hearsay evidence. If no objection is made at the time to evidence, all objection to it is considered as waived. If a general objection to it is made, but no ground of objection is specified, the objection will not be considered. If a ground of objection is stated, all grounds not specified are considered as waived. *Camden v. Doremus*, 3 How. 515; *Evanston v. Gunn*, 99 U. S. 660. But there is sufficient in the defendant's answer, in connection with the testimony of Mr. Abbott, outside of said hearsay evidence, to establish infringement by a use by the defendant of the machine seen by Mr. Abbott at his shop. The defendant is not himself sworn, nor does he produce any witness to show that Mr. Abbott's drawing or description is incorrect, or that the machine was not used by the defendant, or that the defendant had more than one

machine. The answer states that the defendant is "advised that his machine does not conflict with that described in said letters patent of complainant." It also denies that the plaintiff has ever had any just right, by virtue of any patent, in "the machine" used or operated by the defendant. This is sufficient, in view of the foregoing considerations, to show a use by the defendant of the machine seen and described by Mr. Abbott. Taking the whole bill together, it must be held to aver a use since the plaintiff's patent was granted, and the proof and the answer must be held to apply to such a use.

No objection made to the regularity of the taking of the testimony of Mr. Abbott is tenable. In addition to the points considered in the decision on the motion as to the evidence in the Hayes case, so far as those points apply to this case, the record states that the evidence of Mr. Abbott was taken before the examiner, and that Mr. Abbott was first duly sworn, and there is a jurat at the end purporting to show a reswearing of the witness after the close of his whole testimony, and the examiner certifies that the proofs were taken before him. No objection, setting forth any irregularity, appears on the record, nor has any motion been made based on any, except in so far as the motion made in the Hayes case covers any. Any issue as to the citizenship of the plaintiff, raised by the pleadings, is immaterial, as the subject-matter gives jurisdiction. None of the objections taken by the defendant, in the course of the examination of Mr. Abbott, are regarded as tenable.

The patent having been granted to the plaintiff, he is to be presumed to be still the owner of it. No assignment by him is alleged or proved. There must be the usual decree for the plaintiff as to the fourth claim of the patent.

FISCHER v. O'SHAUGHNESSEY and another.

(Circuit Court, S. D. New York. January 26, 1881.)

1. JOINT INFRINGEMENT—PLEADING.

The objection that a bill does not allege an infringement by the defendants jointly should be taken by demurrer.

- 2. LETTERS PATENT** No. 74,068, granted to Valentine Fischer, February 4, 1868, for an "improvement in machine for forming sheet-metal mouldings," are shown to be infringed, as to the fourth claim, by the evidence in this case.—[Ed.]

In Equity. Suit for Infringement.

Charles F. Blake, for plaintiff.

James H. Whitelegge, for defendants.

BLATCHFORD, C. J. All material questions involved in this case are covered by the decisions in the cases of the same plaintiff against Hayes and Neil, except the question of infringement. The bill contains the same allegation on that point as in the case against Neil. Mr. Abbott testifies that he saw at the defendants' shop, on the nineteenth of June, 1879, which was four days before the bill was sworn to, and five days before it was filed, a machine for bending sheet metal, of which he produces a drawing. He also describes the construction and mode of operation of the machine and the dies he so saw. It is clear that, to make or use such a machine in the way described, to bend sheet metal, infringes the fourth claim of the plaintiff's patent. Mr. Abbott says that, at the time of his said visit, he saw the defendant O'Shaughnessey in person, and that he admitted to him (Mr. Abbott) "that he had used the said machine as I have described whenever necessary, since he had owned it for forming cornice and similar work." Neither of the defendants is sworn, nor is any witness produced to show that Mr. Abbott's drawing or description is incorrect, or that the machine was not used by the defendants, or that the defendants had more than one machine. The answer states that the defendants are "advised that their machine does not conflict with that described in said letters patent of complainant." It also denies that the plaintiff has ever had any just right, by virtue

of any patent, in "the machine" used or operated by the defendants. On all this there is shown a use by the defendants of the machine seen and described by Mr. Abbott. Taking the whole bill together, it must be held to aver a user since the plaintiff's patent was granted, and the proof and the answer must be held to apply to such a case. The proof of user is sufficient without the admission of Mr. O'Shaughnessy, and without reference to the point taken that no admission by him binds Simpson.

As to the point that the bill does not allege an infringement by the defendants jointly, if it does not, the objection should have been taken by demurrer; if it does, the proof and the answer make out a joint infringement.

There must be the usual decree for the plaintiff as to the fourth claim of the patent.

THE S. SHAW.*

(*District Court, E. D. Pennsylvania.* January 14, 1881.)

1. ADMIRALTY—COLLISION—ANCHORING IN MID-CHANNEL AND IN RANGE OF LIGHTS.—A bark proceeding down the Delaware river anchored at sundown in mid-channel, and in range of the government lights. A tug following her, with a schooner in tow, did not observe that she was at anchor until too late to prevent a collision by which the bark was injured. *Held*, that the act of the bark in anchoring where she did tended to produce the collision, and that she was, therefore, in fault.
2. SAME—ADMISSION OF LIABILITY—FROM WHAT CIRCUMSTANCES IMPLIED—AGREEMENT TO ARBITRATE.—The testimony left it doubtful whether the tug should have observed the bark earlier, but it appearing that the owner of the tug had offered to pay for the cost of repairs to the bark without damages for detention, which offer was refused, and had then signed an agreement to refer to arbitrators "the amount to be paid," which agreement was afterwards abandoned because he claimed the right to call witnesses as to the cause of the collision, *held*, that this amounted to an admission of some fault in the tug, and the damages should be, therefore, equally divided between the bark and the tug.

*Reported by Frank P. Pritchard, Esq., of the Philadelphia bar.

In Admiralty.

Libel by the master of the bark Ajace against the steam-tug S. Shaw for damages sustained by collision. It appeared from the evidence that the bark, on September 18, 1879, started from Philadelphia and proceeded down the Delaware river in tow of a tug. Late in the afternoon she passed the tug S. Shaw, also bound down the river, and with the schooner Annie M. Allen in tow. About sundown the tug in charge of the bark left her, and she then let go her anchor and swung round with her head to the tide, which was then ebb. The tug Shaw, coming down behind her, did not discover that she was at anchor until the vessels were in close proximity, and was then unable to prevent the schooner from colliding with and injuring the bark. At the place where the collision occurred the river was about two miles wide. The bark anchored in mid-channel, and also in range of the government lights. It appeared that, by a statute of the state of Delaware, vessels were prohibited from anchoring in range of these lights. There was conflicting testimony as to the time which elapsed between the bark coming to anchor and the collision, and as to whether the bark's anchor light was up before the collision. The theory of the libellant was that while the bark was at anchor the tug attempted to cross her bow, and the schooner was in consequence carried by the tide down upon the bark. The theory of the respondent was that while the tug was following the bark the latter, without warning, suddenly came to anchor in mid-channel, and thus caused the collision.

It appeared, also, that a day or two after the collision the owner of the tug offered to pay the captain of the bark the cost of the necessary repairs to the bark. The captain of the bark demanded \$2,400, which included, besides cost of repairs, damages for detention, expenses, etc. An arbitration was then suggested, and a written agreement drawn up and signed, whereby the parties agreed "to submit the question of the amount to be paid the Italian bark Ajace, of which the undersigned, Federico Morice, is master, in consequence of the collision between said bark and the schooner Annie M.

Allen and steam-tug S. Shaw, to two arbitrators." Immediately afterwards the parties entered into a conversation, in the course of which the owner of the Shaw claimed that he had the right under the agreement to call witnesses, not only as to the amount of damages, but also as to the cause of the collision. This was denied by the captain of the Ajace, and the parties thereupon separated without attempting to carry out the agreement of arbitration. This libel was then filed.

Henry Flanders, for libellant.

Henry R. Edmunds, for respondent.

BUTLER, D. J. I find both vessels in fault. The Ajace should not have anchored where she did,—virtually in mid-channel, and within range of the government lights. The act tended directly to produce the collision which followed. It did not, however, relieve the Shaw of her duty to observe proper care and keep off if the Ajace was seen in time. Whether the latter vessel's lights were up, and whether she was, or should have been, seen in time to avoid the collision, is open to doubt, if the testimony of witnesses, bearing directly upon the question, alone, is considered. But considering also the subsequent conduct of Captain Bougher, owner of the Shaw, I am satisfied this vessel, too, was in fault. Taking the agreement to arbitrate signed by him, with his testimony, and that of Captain Guneeo, respecting it, he must be regarded as admitting that his vessel was in fault. The paper, viewed alone, would justify a conclusion that he acknowledged responsibility for the entire consequences of the collision. But the testimony of Captain Guneeo, as well as his own, shows that so broad an admission was not intended. At the outset he offered, unhesitatingly, to pay the cost of repairs,—covering as he supposed the entire injury sustained by the vessel—but refused to compensate for loss of time, or anything beyond such repairs. It was Captain Guneeo's claim to more that led to the agreement to arbitrate. Immediately after signing the paper, the parties disagreed about its meaning. Captain Bougher, supposing himself entitled to show fault in the Ajace, offered testimony to that

point. His antagonist, denying the right to do this, objected to the offer; and in consequence of this disagreement the arbitration was abandoned. Viewed in the light of the testimony referred to, the proper interpretation of the paper is that Captain Bougher admitted liability for the loss sustained, but not the *entire* liability. This view is consistent with all he did. At the outset he asserted, on the information of his captain, that the Ajace was in fault; and he subsequently offered to prove it,—to show, as I must suppose, the *extent* of his liability. This liability depended,—the extent of it, (whether for the whole or a part only,)—on the conduct of the Ajace. No other interpretation of the paper is consistent with the conduct of Captain Bougher. If he did not intend to admit liability, he would not have agreed to confine the arbitration to the subject of damages; and if he intended to admit liability for the *entire* amount, he would not have insisted, when making the admission, that the Ajace was in fault, and immediately after, when the agreement was being carried out, have insisted on showing such fault. The only rational conclusion is that he intended to admit his own fault, and to hold the Ajace liable for hers.

A decree will accordingly be entered for the libellant for one-half the damages sustained.

HENDECKER v. ROSENBAUM and others.

(Circuit Court, S. D. New York. February 1, 1881.)

1. TIME OF REMOVAL—ACT OF MARCH 3, 1875, § 3.

The words, "before or at the term at which said cause could be first tried, and before the trial thereof," contained in section 3 of the act of March 3, 1875, relating to the removal of causes, mean, in regard to suits then pending, the first trial after the right of removal attaches, subsequently to the passage of the act.

2. SAME—SAME.

Suit was brought in a state court, January, 1872; put at issue March, 1872; tried by a jury, June, 1878; verdict and judgment obtained by plaintiff, July, 1878; judgment affirmed by the general term of the court, March, 1879; judgment reversed by the court of appeals, and new trial ordered, June, 1880; judgment of court of appeals made judgment of court below, June 11, 1880; petition for removal filed by plaintiff December 31, 1880. *Held*, upon motion to remand, that the petition for removal was not filed in time, under section 3 of the act of 1875.—[Ed.]

Motion to Remand.

W. H. McDougall, for plaintiff.

Nash & Holt, for defendants.

BLATCHFORD, C. J. This suit was brought in a court of the state of New York, in January, 1872, and put at issue by an answer in March, 1872, making an issue of fact triable by a jury. It was tried before a jury in June, 1878, and the plaintiff had a verdict and a judgment in July, 1878, thereon. On appeal, the judgment was affirmed by the general term of the court in March, 1879. In June, 1880, the court of appeals reversed and annulled the judgments of the court below, and ordered a new trial. On June 11, 1880, the state court, by order, made the judgment of the court of appeals its judgment. In December, 1880, the plaintiff took proceedings in the state court for the removal of the cause to this court, before the second trial of it. The defendants now move to remand the cause to the state court on the ground that the removal was not made in time.

It is not claimed that the removal can be sustained under any provision of section 639 of the Revised Statutes. It

must take place, if at all, under the act of March 3, 1875, (18 U. S. St. at Large, 470.) The only question that will be considered is as to time. By section 3 of that act the petition for removal must be filed in the state court "before or at the term at which said cause could be first tried, and before the trial thereof." This provision applies to "any suit mentioned in" section 2 of that act. Section 2 applies to "any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court." This suit was pending in the state court when the act of March 3, 1875, was approved. The petition for removal in this case was filed in the state court on the thirty-first of December, 1880. Not only was the petition for removal not filed before or at the term at which the cause could be first tried after March 3, 1875, but it was not filed before or at the term at which the cause was, in fact, first tried, nor was it filed before the trial of the cause. As applicable to a case like the present, the words "the trial" must be read as if they were "the first trial." In view of prior removal acts the words "first trial" have a special meaning, and the words "the trial" refer to the trial involved in the preceding words "first trial."

Under section 639 of the Revised Statutes it was, as to cases under subdivisions 2 and 3 of that section, in sufficient time if the petition was filed "at any time before the trial or final hearing" of the suit. The act of July 27, 1866, (14 U. S. St. at Large, 306,) embodied in subdivision 2 of section 639, used the words "trial or final hearing." The act of March 2, 1867, (Id. 558,) embodied in subdivision 3 of section 639, used the words "final hearing or trial." These last words were altered in the Revised Statutes to read "trial or final hearing." The words in the act of 1867 were passed upon by the supreme court in *Ins. Co. v. Dunn*, 19 Wall. 214, and it was held that the word "final" applied to "trial" as well as to "hearing," and that under that act a suit at law could be removed by a petition filed at any time before its final trial,—that is, at any time before a trial final in the cause as it stood when the application for removal was made,—and therefore that it could be removed after a verdict on a trial

had been set aside and a new trial granted. The court refers to the difference in language between the act of 1866 and the act of 1867, and says that if that difference be "material it is fair to presume that the change was deliberately made to obviate doubts that might possibly have arisen under the former act, and to make the latter more comprehensive." This decision was made at the October term, 1873. The Revised Statutes were enacted June 22, 1874, changing the words "final hearing or trial" to "trial or final hearing," as in the act of 1866, and then came the act of 1875. It indicates a clear intention to narrow the latitude allowed under the previous statutes, and it is entirely clear that it does not allow this cause to be removed. The words "final trial" are no longer used, nor the word "tried" alone; but the words "first tried," and in connection with those words the word "trial," in the sense of "first trial." This was the view held by Judge Swing in *Young v. Andes Ins. Co.* 3 Cent. Law Jour. 719. The words in the act of 1875 mean, in regard to suits then pending, the first trial after the right of removal attaches, subsequently to the passage of the act. *Hoadley v. San Francisco*, 3 Sawy. 553, 555. The case of *Bible Society v. Grove*, 101 U. S. 610, is, so far as it goes, an authority against the removal in this case. There a suit was pending when the act of 1875 was passed. There was a trial of it thereafter at a term, and the jury disagreed. The case was continued at that term, and again at a subsequent term. After the latter term had passed the defendants took steps to remove the cause. The supreme court held that the proper construction of section 3 of the act of 1875, in regard to suits pending when the act was passed, is that the petition must be filed at the first term of the court after the passage of the act at which the cause could be tried, and that the removal in the case before it was too late.

The motion to remand is granted, with costs to be taxed.

FARMERS' LOAN & TRUST CO. v. GREEN BAY & MINNESOTA
R. Co.

(Circuit Court, E. D. Wisconsin. January, 1881.)

1. RAILROAD—MORTGAGE FORECLOSURE—PETITION FOR BILL OF REVIEW.

A trustee filed a bill to foreclose two railroad mortgages, January 23, 1878, and obtained a decree of foreclosure April 3, 1879. *Held*, upon petition of a second-mortgage bondholder for a bill of review, filed January 10, 1881, within a few days before the sale under the decree of foreclosure was advertised to take place:

(1) That an adjudication in such decree that part of the second-mortgage bonds were issued in exchange for interest coupons due upon the first-mortgage bonds, and were, with interest thereon, "a lien under the said first mortgage, and constituted a part of the debt secured thereby," did not entitle such second-mortgage bonds to a preference over the first-mortgage bonds.

(2) That, therefore, where the decree had provided that the greater part of the purchase money, upon the sale of the railroad, might be paid in cash, or first-mortgage bonds, or such second-mortgage bonds as had been therein adjudicated to be secured by said first mortgage, at such percentage as the court should authorize at the confirmation of the sale, it was not necessary that such decree should further provide for a cash payment at the time of the sale sufficient in amount to liquidate in full such second-mortgage bonds as were secured by said first mortgage.

(3) That a course of procedure prescribed by the mortgages, to be pursued in case of a sale by the trustee without foreclosure, was not binding upon the court in proceedings to foreclose such mortgages.

(4) That, therefore, upon a foreclosure sale, the court was not bound to adopt the provisions of the mortgages, as to the application of the bonds upon the bid of a purchaser, or as to the proportion in which such bonds should be so received, or as to the manner in which their value should be ascertained.

(5) That where the decree authorized the mortgage bonds to be applied on the purchase of the railroad upon the foreclosure sale, it was not essential that such decree should determine the percentage value of such bonds before the sale actually took place.

(6) That, therefore, a provision in such decree that the purchaser, after the payment of a certain specified amount in cash, could pay the balance of his bid in outstanding bonds and coupons, secured by the first mortgage, "at such percentage of the face value thereof as this court shall, at the approval of said sale, authorize and direct," was not erroneous, and was similar to that inserted in all railroad mortgage foreclosure sales entered in the (seventh) circuit.

(7) That the court could require, upon the subsequent presentation of intervening claims, as a condition precedent to the confirmation of the sale, that the purchaser should make a larger cash payment to meet all exigencies than that fixed by the terms of the decree.

(8) That a question as to an adverse title to a part of the mortgaged premises, pending between the receiver of the railroad and a third party, did not seem to be one that could be litigated in a suit to foreclose the mortgage.

(9) That the denial of the railroad's title would divest the petitioner of all right to object to the decree and foreclosure proceedings, upon the ground that such third party was not made a defendant to the foreclosure suit.

(10) That where, upon default, a majority of the bondholders had requested the trustee to institute foreclosure proceedings, the mere fact that certain bondholders, including the president of the railroad, retained counsel for the company for the purpose of procuring service of process of subpoena in a genuine action to foreclose these valid mortgages, given to secure a just debt, did not constitute a fraud upon the petitioner, although she had no knowledge at the time of such action by said bondholders.

(11) That an agreement entered into between the bondholders for the proposed reorganization of the road could only be considered, under the petition, to the extent that the particular interests of the petitioner might be involved; and that under this restriction no such grounds of objection to the agreement were presented, or such probable injury to the petitioner shown, as made the petition sustainable.

(12) That it was a serious question whether the petitioner had not been guilty of laches in presenting such petition nearly two years after the decree had been filed, and within a few days before the sale was advertised to take place, without any averments in the petition that would seem to sufficiently excuse the delay.

(13) That the petition did not allege that the petitioner had any interest in the second-mortgage bonds secured by the first mortgage, or that the mortgaged property was of sufficient value to pay more than the first-mortgage bonds, or contain any allegation whatever as to the value of the mortgaged property, and that therefore it was not certain that the petitioner, as the holder of the bonds described in her petition, had any real interest in the subject-matter of the controversy.—[Ed

In Equity.

Finches, Lynde & Miller, for petitioner.

E. C. & W. C. Larned, contra.

DYER, D. J. On the twenty-third day of January, 1878, the complainant in the above-entitled cause, as trustee for bondholders, filed a bill in this court to foreclose two mortgages on the railroad and property of the defendant company,

given to secure the payment of certain issues of bonds, amounting in the aggregate to \$5,300,000. On the third day of April, 1879, a decree of foreclosure and sale of the mortgaged property was entered. On the tenth day of January, 1881, and but a few days before the sale under the decree of foreclosure was advertised to take place, Mary M. Kelly, a holder of bonds secured by one of the mortgages, filed a petition in said cause praying leave to file a bill of review for certain alleged errors and irregularities in the foreclosure proceedings; and the question has been raised by demurrer to the petition, and argued and submitted, whether or not leave to file such a bill should be granted. The determination of petitioner's right to file a bill of review involves, therefore, a consideration of the contents of the petition in connection with such parts of the record in the foreclosure case as are brought into controversy by the allegations of the petition.

As appears by the foreclosure decree, the original issue of bonds secured by the first mortgage was \$3,200,000, and the issue of bonds secured by the second mortgage was \$2,100,000.

The petitioner alleges herself to be the holder of second mortgage bonds amounting to \$14,320, besides interest. The decree adjudges that "of the said second mortgage bonds the sum of \$850,260 was issued in exchange for interest coupons, due upon said first mortgage bonds, and is, with the interest due thereon, a lien under the said first mortgage, and constitutes a part of the debt secured thereby;" and by the decree it is further adjudged and decreed "that the entire amount of bonds secured by the said first mortgage is the sum of \$4,050,260, being the amount of first mortgage bonds of \$3,200,000, * * * and the said amount of \$850,260 of second mortgage bonds issued as security for interest due on said first mortgage bonds. * * * That the entire amount of bonds outstanding and unpaid, secured by the said second mortgage, * * * is the sum of \$2,100,000, of which amount the sum of \$850,260 was issued to secure past-due interest coupons on said first mortgage."

Further provisions of the decree important to notice are,

that any of the bondholders may become purchasers of the mortgaged property at the foreclosure sale; that the sum of \$25,000 shall be paid in cash at the time of sale, and that the purchaser shall comply with his bid on the day of the sale; that "after the payment to the marshal of the sum of \$25,000 in cash, of the sum bid by the purchaser at said sale, the marshal may receive from said purchaser for the balance of the sum bid at such sale, in lieu of cash, any of the outstanding and unpaid bonds or coupons secured by the said first mortgage, at such percentage of the face value thereof as this court shall at the approval of said sale authorize and direct." Also, "that so much of the purchase money at said sale as shall be necessary to pay the costs of this suit as taxed, and the costs and expenses of said sale, and the amount hereby adjudged to be due to the said complainant and its solicitors, shall be paid in cash, and that the remainder of said purchase money may be paid in cash or in said first mortgage bonds, or such of said second mortgage bonds as are by this decree held to be secured by said first mortgage in the proportion aforesaid."

1. It is claimed by the petitioner that, in various particulars set forth in her petition, error and ambiguity are apparent in the decree; and one of the allegations upon which this claim is founded is that "it appears on the face of the decree that a cash bid of \$25,000 is not sufficient to make valid and effectual the terms of the decree, in this: that the said decree provides on its face that \$850,260 of the second mortgage bonds given in exchange for first mortgage coupons, with the interest thereon, shall be a first lien and charge upon all the property, real and personal, by said first mortgage conveyed, and to satisfy said \$850,260 as a first lien, a sum of over \$25,000 in money should and ought to be directed to be paid." This objection to the decree is founded upon a misapprehension of its scope and meaning. The decree does not give to the \$850,260 a rank in advance of the first mortgage bonds. It declares that second mortgage bonds of that amount were issued in exchange for interest coupons due upon the first mortgage bonds, and are, with interest, a lien under the first mortgage, and entitled to be proved under that mortgage and

constitute *a part of the debt secured thereby*. Again, in another part of the decree, it is declared that "the sum of \$850,260 was issued to secure past-due interest coupons on said first mortgage, and *is secured by said first mortgage as aforesaid*;" and, as we have already seen, it is further provided that the purchase money on the bid "may be paid in cash or in said first mortgage bonds, or such of said second mortgage bonds as are by this decree held *to be secured by said first mortgage*." It is clear, therefore, that the second mortgage bonds to the amount of \$850,260 are simply placed on the same footing as the first mortgage bonds—not as having a preference over the latter, but as being equally secured under the first mortgage with the first mortgage bonds. There was, therefore, no greater or other reason why the decree should provide for a cash payment on the bid of a purchaser sufficient to cover the \$850,260, than there was for a cash payment adequate to cover the entire amount of the first mortgage bonds.

2. The mortgages provided that in case of default in payment of either the principal or interest due on the bonds secured thereby, and on written request of the holders of a specified proportion of the bonds, the trustee might sell the mortgaged property; and it was therein further provided that "the amount of the bid or purchase money of said sale may be paid and satisfied in whole or in part by the outstanding mortgage bonds, or any of them, issued hereunder, and the same shall be taken and received in whole or in part payment and satisfaction by the party of the second part, its successor, or successors, according to their value, to be ascertained and determined by the net amount arising from such sale as compared with the amount of outstanding bonds issued hereunder as aforesaid."

The decree, as we have before observed, provides that after payment of \$25,000 in cash of the sum bid at the sale under the decree, the purchaser may pay the balance of his bid in outstanding bonds and coupons, secured by the first mortgage, "at such percentage of the face value thereof as this court shall, at the approval of said sale, authorize and direct."

Now, it is alleged in the petition that the decree is erro-

neous in that it does not observe or follow the terms of the mortgages as to the receipt of bonds as part of the purchase price for the property sold. The sale authorized in the mortgages was one to be made in certain contingencies by the trustee. It was a sale to be made in accordance with the stipulations of the parties. The course of procedure there prescribed was one to be pursued in case of a sale without foreclosure, and it was competent and proper for the parties to place upon the trustee certain restrictions, and to define the limits within which he must act in making such a sale. But those provisions could not bind the court if foreclosure proceedings should be instituted, and a sale should be made under its direction. In such case the sale would have to be made according to the usual course of practice in judicial proceedings, and the court would be no more bound to adopt the provisions of the mortgages, as to the acceptance from a purchaser of bonds to apply on his bid, or the proportion in which bonds should be so received, or the manner in which their value should be ascertained, than it would be bound to adopt the directions to the trustee, contained in the mortgages, as to the advertisement of the property for sale. As a test of this question, suppose the court, ignoring the provisions of the mortgages altogether, should order the property sold for cash, and in no manner authorize the payment of a bid in bonds, would that be an error of which a bondholder could complain? Clearly not. Undoubtedly, the court might adopt, so far as practicable, the method of procedure pointed out in the mortgages, but it would not be error affecting the validity of the decree not to do so, unless wrong and injustice were apparent in the decree entered by the court; and I am unable to perceive wherein the decree in the particular under consideration fails to observe the rights of all parties.

3. This brings us to another point urged against the validity of the decree, and which in some aspects connects itself with the question last considered. It is alleged in the petition, as one of the grounds on which the court should allow a bill of review to be filed, that the decree does not establish the percentage value of the bonds or coupons secured by

either of the mortgages; that in order to secure just and equitable bidding at the sale, the value of the bonds should be ascertained by proof, on reference to a master before the sale, and that without such previous ascertainment of value no bidder can know what amount of bonds or coupons he can pay on his bid. In the first place it may be remarked that the provision in question in the decree is similar to that inserted in railroad mortgage foreclosure decrees in this circuit, as I am advised by the circuit judge, whom, for certainty of information, I have consulted on the point. Obviously, the value of the bonds and coupons must depend on the value of the mortgaged property, and that value is best ascertainable by sale of the property. I do not see, therefore, how it would be possible, or at least practicable, to determine the value of the bonds, or to determine what percentage of value should be applied on the bid, before the sale transpires. There may be prior liens to be paid in the shape of intervening claims, and I cannot perceive how a proper and effectual sale can be made,—if bonds are to be applied on the bid,—unless the court is permitted to fix the rate, after the sale is reported, at which bonds shall be received. And it would seem that an attempted ascertainment of value of the bonds, before the sale, for the purpose of fixing the rate at which they may be applied on the bid, would be more likely to involve injustice, especially to small holders, than an ascertainment made subsequently, because before sale the only value susceptible of proof might be one merely nominal, while after the sale the value would be actually represented by a realized price. In this connection it is urged that the decree does not determine what amount of bonds may be taken to apply on the bid. Whether it can be said, in strictness of definition, that the sale authorized by the decree is a cash sale or not, I think it is equivalent to that. The decree provides that \$25,000 in cash shall be paid by the bidder at the time of the sale; that after such payment the *balance* of the bid *may be* paid in bonds and coupons, or, as it is expressed in another part of the decree, after the payment of costs and expenses, etc., the remainder of the purchase money

may be paid in cash or in certain designated mortgage bonds. Certainly the court would have the power to require the entire amount of the bid to be paid into court in cash, and then to apply the money in payment of costs and upon the bonds at such a percentage as the entire bid would pay. In that case the court would receive the money and directly pay it out again in dividends on the bonds. In the case contemplated by the decree, the bonds are brought in as representing a part of the cash bid, and suitable indorsements and cancellations made, so that the transaction is made equivalent to the payment in cash of the entire purchase money, and the application of it on the bonds in the manner before indicated. Could the court have foreseen what has occurred since the entry of the decree, especially in regard to the presentation of intervening claims, it is probable that it would have required, in terms, the payment of a larger sum in cash at the time of the sale than \$25,000; but I do not think that very important, because the court has the undoubted power to require a sufficient sum to meet all exigencies to be paid into court as a condition of confirming the sale. After careful consideration of the question, I am unable to perceive how injustice could result to bondholders from the terms of this decree in the particulars referred to. Every bondholder or other person is at liberty to bid at the sale. He may bid what he thinks the property is worth. He knows that the price for which the property may be sold will represent the value of the property, and will fix the value of the bonds. He knows that the proceeds of the sale must be used to pay bonds, and that they must be applied *pro rata* upon bonds. He knows, also, that the percentage so to be applied will depend upon the amount for which the property sells, and the amount of the bonds; and knowing further that if the sale is properly conducted and if he is the highest bidder he will get the property, he is left to freely and fairly exercise his judgment as to the sum he will bid. On the whole, my opinion is that the decree is not erroneous, and does not, in form or substance, deviate from correct practice in the particulars which have been considered.

4. The petition alleges that the receiver in the foreclosure action has filed a bill in this court, against D. M. Kelly and others, to set aside certain deeds of depot grounds, right of way, and other lands, which, it is claimed by the receiver, belong to the railroad company, and which, it is claimed by the defendants in said bill, belong to them; that the right of the company to said property should be adjudicated in the foreclosure suit; and that the title deeds thereof were of record before the bill in the foreclosure action was filed; and it is further alleged in the petition that the said D. M. Kelly and others, who are defendants in the action brought by the receiver to settle the title of the lands in controversy in that action, were necessary parties in the foreclosure suit, and that without their presence in that suit their legal or equitable rights to the lands cannot be cut off by the foreclosure decree, and a perfect title thereto given to the bidder at the foreclosure sale.

I am unable to see how the rights of the petitioner are injuriously affected by the facts thus alleged. It is apparent, from the allegations she makes, that D. M. Kelly and others are claiming the lands in question as their own under a title adverse to the railroad company. If they succeed in the litigation with the receiver, they will hold the lands. If they fail, then it will result that the lands fall into the general mass of property covered by the mortgages, and the title will pass to the purchaser at foreclosure sale. Such a question of adverse title could not be litigated in the foreclosure suit; and, moreover, the petitioner, in my opinion, divests herself of all right to make this objection to the decree and the foreclosure proceedings, because, in connection with her allegations on the subject, she denies that the lands in question are the property of the railroad company, and of course thereby inferentially affirms the right and title to the lands of the defendants in the action brought by the receiver.

5. But it is charged in the petition that the action to foreclose the mortgages in suit was fraudulently and collusively brought; and in the consideration of this phase of the case it is necessary to take notice of the allegations of the petition.

Those allegations, stated in somewhat condensed form, are that certain bondholders, including John I. Blair and William E. Dodge, caused the foreclosure bill to be filed; that to carry out certain schemes for getting control of the mortgaged property, and to obtain unjust and improper advantages over the petitioner and other bondholders and stockholders, Blair and Dodge retained J. P. C. Cottrill, Esq., as attorney for the railway company; that Mr. Cottrill had never before acted as the general attorney of the company, and that, immediately after retaining him, Blair and Dodge caused the bill in the foreclosure action to be filed, and a subpoena to be issued and served upon said Cottrill, as attorney of the company; that the only service which Mr. Cottrill or his firm thereafter rendered in the case was to file an answer, which had been previously prepared by the counsel for Blair and Dodge and their party of bondholders. It is alleged that neither Mr. Cottrill nor his firm had any personal knowledge of the facts stated in the foreclosure bill or in the answer thereto, and that they had nothing to do with the drafting of the answer, and were not consulted or advised with about the subject-matter thereof. It is charged that at the time the said Cottrill was so appointed attorney of the defendant company, William E. Dodge was the president of the company, and that upon his appointment as such attorney Mr. Cottrill went with the solicitor of the complainant, the Farmers' Loan & Trust Company, before the judge of this court and consented to the appointment of a receiver in the foreclosure suit; that at the time of his appointment as attorney for the company said Cottrill was shown by one of the solicitors for the complainant a letter from Dodge appointing him such attorney, and that he acted under such letter of appointment; that the appointment of said Cottrill was obtained by Blair and Dodge, and those in interest with them, for the fraudulent purpose of obtaining a fraudulent and collusive service of process in the foreclosure suit, and not with *bona fide* intent to make him the general attorney of the company to defend its interests. It is then charged, generally, that the appointment of said Cottrill as attorney, for the purpose of serving process of subpoena upon

him, was fraudulent as to the stockholders and other bondholders of the company, not parties thereto, and was made by Blair and Dodge, and their associates, for the fraudulent and collusive purpose of obtaining service of the subpoena in the foreclosure suit. And so, it is further alleged, that such service was fraudulent and collusive, and was a fraud on the court, and upon all stockholders and bondholders who did not know or assent to the same, and should therefore be set aside, with all proceedings in the foreclosure suit subsequent to the issuing of the subpoena. It is then stated that the complainant, the Farmers' Loan & Trust Company, had knowledge of and colluded with Blair and Dodge in the matter of the appointment of said Cottrill as attorney for the company, and in the service of process on him, and that the petitioner had no knowledge of any of these alleged facts until the seventh day of January, 1881.

Many of these allegations are made on information and belief; but, admitting them all to be true, the question is at once suggested, wherein consists the fraud upon the petitioner, and how is she injured by the matters complained of? She cannot be heard in behalf of stockholders, for they are not here complaining. She cannot be heard in behalf of other bondholders, for they must speak for themselves if they have been wronged. The only question is, wherein has the petitioner been injured or defrauded by the proceedings mentioned? This was not the case of a fictitious action without a genuine subject-matter to support it. Here were large mortgages given to secure bonds, the interest on which was unpaid. The genuineness of these instruments, and the validity of the debt they represented and secured, are not questioned. By the allegations of the bill in the foreclosure suit, which is part of the record, it appears that the holders and owners of bonds, amounting to more than one-half of the entire issue under each of the mortgages, requested the trustee to institute foreclosure proceedings. This is not denied in the present petition, and, if true, it was the duty of the trustee to file the bill in behalf of all the bondholders. It could not concern bondholders how service of process on

the company was obtained, provided the court legitimately obtained jurisdiction of the parties. And why should not the mortgages be foreclosed, provided a reasonable proportion of the holders of bonds requested it to be done? Certainly the petitioner cannot be heard to say that it was the duty of the company to resist and obstruct a foreclosure. If the mortgages were valid, and the debt due, and if the company could not make payment,—the contrary of which the petition does not allege,—then it was the duty of the company to permit the trustee to foreclose, and the bondholders to realize their money. Nor upon such a state of facts does it seem to me that it would be a fraud upon bondholders if the president of the company were to employ counsel to act for the company, even in advancement of the foreclosure. The gist of the petitioner's allegations is that certain bondholders—one of whom was the president of the company—retained counsel for the company for the purpose of procuring service of process of subpoena in a genuine action to foreclose valid mortgages given to secure a just debt. Stockholders being silent, I am unable to perceive how the petitioner can maintain that the proceeding complained of was a fraud upon her, or a fraud upon the court.

There are allegations to the effect that the object of Blair and Dodge and their associates was to obtain ultimate control of the mortgaged property. But the proceedings to foreclose the mortgage were necessarily public. The sale following the decree must likewise be public and open to all bidders. Confirmation of the sale by the court must of necessity also be open to the resistance of any party in interest, if the sale should not be fairly conducted, or if there should be such inadequacy of price as might involve a sacrifice of the property or injury to parties interested. Considering this matter in all the points of view suggested, the manifest infirmity in the petitioner's case, upon this branch of it, is that she shows no fraud upon her and no injury to her. Attention was called on the argument to certain admissions contained in the answer of the company filed by Cottrill & Cary in the foreclosure suit as prejudicial to the rights and

interests of the petitioner. But it is not perceived how or wherein they could operate to her injury; and, moreover, the truthfulness of those admissions is nowhere denied or questioned in the present petition.

I have examined with care the cases cited by petitioner's counsel: *Lord v. Veazie*, 8 How. 251; *Gaines v. Hennen*, 24 How. 553; *Wood Paper Co. v. Heft*, 8 Wall. 334; *Cleveland v. Chamberlain*, 1 Black, 419; and *Forrest v. M., S. & L. Ry. Co.* 65 Eng. Ch. Rep. 125. This opinion has been already extended to such length that I forbear to enter upon a review of those cases further than to say that I deem them upon their facts, and in the principles they involve, inapplicable to the case at bar.

6. Incorporated in the petition is a copy of the bondholders' agreement and proposed plan of reorganization of the Green Bay & Minnesota Railroad Company, which, it is alleged, Blair and Dodge and their associates seek to consummate to the alleged detriment and injury of other bondholders and of stockholders. I have been somewhat at a loss to determine just the extent to which this extrinsic matter should be considered by the court as bearing upon the validity of the proceedings in the foreclosure suit, or as affording ground for the petitioner to file a bill of review. Certainly it can only be considered to the extent that the particular interests of the petitioner may be involved. The agreement appears to be a voluntary one, and all holders of bonds, second as well as first mortgage bonds, with certain stockholders of the company, are permitted to participate in it. The provisions are such as, I believe, are usual in such agreements. The plan of reorganization contemplates the issue of first and second mortgage bonds, and of preferred and common stock, by a new company, and provides for the exchange, on certain terms and at certain rates, of bonds and stock of the old company for bonds and stock of the new. Such equality of footing as may render secure the various interests of the parties who may enter into the arrangement, appears to be accorded to different classes of bondholders and stockholders; and on the whole, in considering this branch of the case, I do not think that

such grounds of objection are presented, or such probable injury to petitioner is shown, as makes the petition sustainable.

7. Finally and generally, it may be stated that even if the court were in doubt as to the disposition that should be made of the present petition, it would be a serious question whether that doubt would not have to be resolved against the petitioner because of her own *laches*. As before stated, the bill in the foreclosure suit was filed in January, 1878. Since that time the bill, subpoena, record of service of subpoena, and the answer have been on file. The decree was entered in April, 1879. Nearly two years afterwards, and within a few days before the sale was advertised to take place, the present petition was filed. Certainly the delay has been great, and it can hardly be said that it is sufficiently excused by any averments to that end contained in the petition. Then it is not certain that the petitioner, as the holder of the bonds described in her petition, has any real interest in the subject-matter of this controversy. Her bonds are secured by the second mortgage. There is no allegation that they are included in the \$850,260 of second mortgage bonds which were issued to take up past-due first mortgage coupons, and which became secured by the first mortgage. Nor is there any averment that the mortgaged property is of sufficient value to pay more than the first mortgage bonds. There is, in fact, no allegation whatever touching the value of the property covered by the mortgages. And in conclusion, upon all the grounds, and for the various reasons stated, the demurrer to the petition will be sustained, and the petition will be dismissed.

PHILADELPHIA TRUST, SAFE DEPOSIT & INS. CO., Assignee,
etc., v. SEVENTH NATIONAL BANK OF PHILADELPHIA.

(District Court, W. D. Pennsylvania. March 9, 1881.)

1. GENERAL AGENCY—POWER OF ATTORNEY—EVIDENCE.

If there is clear and satisfactory evidence from which a general agency may be inferred, a written power of attorney, conferring upon the agent certain specific powers, will not be construed as restricting the authority of the agent to the particular matters therein specified, if the power of attorney, in its terms, is not exclusive nor inconsistent with such general agency.

2. SAME—SAME—INNOCENT PARTY.

The authority of an agent under a written power of attorney may be impliedly expanded by the conduct of the principal in favor of an innocent third party, even where such party, when dealing with the agent, had knowledge of the written power.

3. SAME—CONTRACT—ESTOPPEL.

If such agent, who, with the knowledge and acquiescence of his principal, has habitually exercised authority beyond the scope of the written power of attorney, enters into a contract with a third party, who was induced to believe by the conduct of the principal that he reposed trusts in the agent beyond those specified in the written power, the principal and his voluntary assignee will be estopped from denying the validity of the contract, especially where it enured to the benefit of the principal, and the other contracting party cannot be restored to his former position.

In Equity. *Sur* Exceptions to Master's Report.

Henry J. McCarthy, Wm. A. Porter, and Wm. Scott, for
Trust Company.

Leonard R. Fletcher, John M. Kennedy, and J. H. Baldwin,
for the Bank.

ACHESON, D. J. This is an interpleader between the Philadelphia Trust Safe Deposit & Insurance Company, assignee under a deed of voluntary assignment for the benefit of creditors of Henry G. Morris, as plaintiff, and the Seventh National Bank of Philadelphia, as defendant. The controversy relates to a composition dividend amounting to \$8,020.43, payable under a composition agreement in bankruptcy made between James T. Wood, surviving Charles A. Wood, deceased, bankrupts, and their creditors. The divi-

dend is claimed by each of the parties to this issue. This composition dividend is upon three promissory notes, made by the bankrupts, which were held by Henry G. Morris at the date of the adjudication in bankruptcy. Morris, who for a number of years was engaged in business as a machinist, etc., at the Southwark foundry, Philadelphia, failed, and on April 29, 1875, made a voluntary assignment for the benefit of his creditors. The fund in controversy is claimed by the plaintiff in this issue as assignee of Morris, under his voluntary assignment. The defendant in the issue, the Seventh National Bank of Philadelphia, bases its claim to the composition dividend upon a pledge of said notes to the bank made prior to the voluntary assignment. This pledge, it is claimed, was made by Alexander Ervin, the agent of Henry G. Morris, as collateral security for then-existing and future indebtedness of Morris to the bank. Upon the subject of this pledge the master finds as follows: "Shortly after this, in the latter part of February, 1875, Mr. Ervin [Alexander Ervin] was in the bank; D. B. Ervin, the president of the bank, and W. H. Heisler, the cashier, being present. They complained to him of the condition of Henry G. Morris' account, and objected to renewing any of his paper. Ervin then pledged the notes * * * as collateral security for the loan or renewal they were then negotiating, and for future loans and renewals, as well as those that were past. * * * The bank made new loans or renewals after this time, amounting to more than the amount payable on said notes under the composition." This finding of the master is not excepted to, and it seems to be warranted by the evidence.

The real contest concerns the authority of Alexander Ervin to make this pledge. His authority is affirmed by the bank, and denied by the voluntary assignee. Henry S. Morris commenced business at the Southwark foundry on January 1, 1871, and continued it until his voluntary assignment on April 29, 1875. The evidence shows that during all this time Alexander Ervin was the general financial agent of Morris, and possessed his confidence to an extraordinary degree. Ervin from time to time borrowed money for Morris, pledged his

collaterals for such loans, and arranged his discounts. How extensive were the powers which he was permitted to exercise, may be illustrated by reference to the Wood notes. Together they amounted to the large sum of \$41,178.48. Yet, without any previous direction from Morris, or even consultation with him, Ervin bought these notes for Morris from a bill-broker. That the whole financial department of Morris' extensive business was unreservedly entrusted by him to Alexander Ervin, is clearly shown. During his entire business career at the Southwark foundry, Morris kept an account and had large financial transactions with the Seventh National Bank of Philadelphia, all of which were transacted through Ervin. He had complete charge of Morris' bank account, arranged all his discounts with the bank, and made loans for Morris from the bank, pledging collateral securities therefor. Early in February, 1875, a ten per centum dividend (which preceded the composition) was declared by the trustees in bankruptcy of James T. and Charles A. Wood. At that time Ervin brought to the bank the Wood notes, with a dividend warrant signed by Morris, and got the bank to discount this dividend, leaving the notes and dividend warrant with the bank. This discount was passed to the credit of Morris, and the dividend was afterwards collected by the bank. It was subsequent to this transaction that the pledge now in question was made by Ervin to the bank.

Without further recital of the evidence, it is sufficient to say that it fully justifies the conclusion that Alexander Ervin was the general financial agent of Henry G. Morris, and that it was within the scope of his authority to pledge the Wood notes to the Seventh National Bank of Philadelphia in the manner and for the purposes found by the master. It is true that there was deposited in the bank a letter of attorney from Henry G. Morris to Alexander Ervin, dated November 25, 1874, whereby the former conferred upon the latter the following specified powers: "(1) To draw checks against my [Morris'] account in the Seventh National Bank of Philadelphia; (2) to indorse notes, checks, drafts, or bills of exchange, which may require my indorsement, for deposit as cash or for

collection in the said Seventh National Bank of Philadelphia; (3) to accept all drafts or bills of exchange which may be drawn upon me, payable at Seventh National Bank of Philadelphia, and to do all lawful acts requisite for effecting these premises." And the plaintiff insists that the authority of Ervin, as agent of Morris in his dealings with the bank, was limited by the terms of this letter of attorney to the particular matters therein specified, and that the pledge of the Wood notes was beyond the scope of the authority thereby conferred.

The master was of opinion that there was "no evidence that the officers of the bank had seen the letter of attorney at the time the notes were pledged;" and therefore he held that the bank was not to be affected thereby. It is strenuously urged that herein the master erred. But, if it be conceded that the bank was chargeable with knowledge of the contents of the letter of attorney, this does not, in my judgment, help the plaintiff's case under all the evidence. The letter of attorney was executed under the following circumstances: An officer of another bank brought to the president of the Seventh National Bank of Philadelphia a draft accepted "Henry G. Morris *per* Alexander Ervin," and inquired if Ervin had authority so to accept, and whether the Seventh National Bank had his power of attorney. The president of the bank then went to Morris and got from him the letter of attorney of November 25, 1874, which was handed to the cashier. Now, the letter of attorney on its face shows that it relates to transactions involving the *signature* of Henry G. Morris, and I do not think it at all inconsistent with a general agency in all financial matters connected with the business of Morris, with which the evidence shows Ervin was in fact clothed both before and after the date of the letter of attorney. That Morris himself did not regard this letter of attorney as limiting the powers of Ervin, as now claimed by the plaintiff, or intend that it should have that effect, appears from what he said in answer to the following question in the course of his examination in this case: "*Question.* Then I understand from your testimony that, during the months of

January, February, March, and April, 1875, you had no personal knowledge of the state of your account with the Seventh National Bank; of what notes, bills, or drafts were discounted for you, nor what collaterals were given, nor how money was raised from the bank or checked out; in short, that you entrusted the entire management of this part of your financial business during these months to Alexander Ervin, without examination and without statement from him. Am I right?" *Answer. I entrusted such matters to him during that time, as previously, with such additional authority as may have been—as was—given him by the power of attorney."* * * *

There is other evidence showing that the dealings between Ervin, as agent of Morris, and the bank, after the date of the letter of attorney, were as unrestricted as they were before. These subsequent transactions were in the usual course of Morris' business, and enured to his benefit, and he is chargeable with knowledge of them. It does not, therefore, lie in his mouth, or in that of his voluntary assignee, to say that the powers of Morris were limited by the terms of the letter of attorney. The original transaction with the bank in respect to the Wood notes, viz., the discount of the first dividend, was as much outside the scope of the letter of attorney as was the subsequent pledge of the notes.

A written power of attorney may be expanded by the declarations or acts of the principal. Whar. on Agency, § 225. "By such expansions," says this author, "he may extend his liability beyond the written instrument. Eminently is this the case where the principal, by his acts and statements, leads third parties to believe that he has reposed in the agent trusts beyond those specified in the written power. By such a course the principal is estopped from afterwards disputing his liability to innocent third parties, who were led by such acts or statements on his part to contract with the agent." *Id.*

It is clear to me that the conduct of Morris was such as to induce the belief on the part of the officers of the bank that he had invested Ervin with authority to make the pledge in question. In that belief they acted, and Morris received the benefit of the contract. To restore the bank to its former

position is now impossible. In this view of the case, therefore, and aside from the question of actual authority, the plaintiff, whose equities are not superior to those of Morris, is estopped from disputing the defendant's title to the fund in controversy.

It is unnecessary to discuss the several exceptions to the master's report. His conclusion is correct. The exceptions are therefore overruled, and a decree will be entered (substantially in the form recommended by him) in favor of the defendant in the issue.

RHODE ISLAND HOSPITAL TRUST COMPANY, Adm'r, v. HAZARD.

(Circuit Court, D. Rhode Island. February 17, 1881.)

1. WITNESS—PARTY TO SUIT—ACTION BY ADMINISTRATOR—REV. ST. § 858.

In a suit by an administrator for the annulment of a contract, upon the ground of fraud and undue influence, the defendant is disqualified, by section 858 of the Revised Statutes, from testifying as to transactions and conversations with the decedent personally.

2. CONTRACT—FRAUD—INSANITY—EVIDENCE.—[Ed.]

Wm. W. & S. T. Douglas and *Charles Hart*, for complainants.

Chas. S. Bradley and *Benj. N. Lapham*, for defendant.

LOWELL, C. J. This bill is prosecuted by the administrator of John G. Copelin, late of St. Louis, Missouri, having been filed June 5, 1875, by the guardian of Copelin, who was then living, but insane. It alleges and charges that the defendant, Rowland G. Hazard, of Peace Dale, in Rhode Isl., and, on the fourth of February, 1871, was the owner of three-fourths of the capital stock of the La Motte Lead Company, of Missouri; that the property of the company was a lead mine, encumbered by certain mortgages and debts, and was worth nothing beyond them; that the defendant sought the acquaintance of Copelin for the sole object and purpose of selling him as much as possible of said stock, and represented to Copelin that the mine was worth \$3,000,000, and that

it could be sold for that sum; that it was making large profits; that he was willing to sell one-half his stock, being three-eighths of the mine, to Copelin for \$225,000 cash, and the assumption by Copelin of three-eighths of the mortgage debt; that Copelin's mind had become at this time much impaired and weakened, so that he was incapable of managing his affairs intelligently, or comprehending the scope and effect of what he did, and was easily imposed on by the representations and flattery of others; that between the fourth and tenth days of February, 1871, the defendant did, by persistent and repeated representations so made to Copelin, induce him to buy the stock at the price before mentioned, and that an agreement for the purchase was made, which is copied into the bill; that Copelin paid the \$225,000, and \$37,500 of the debts; that Copelin was not capable of understanding even a true representation, but the defendant in fact greatly overstated the value of the property; that Copelin knew nothing of the property except what he learned from the defendant; that the defendant knew, or had reason to believe, that Copelin was not of sound mind; that in November, 1873, Copelin was found by a jury to be of unsound mind; and that in December, 1873, a guardian was appointed for him, who wrote to the defendant a letter rescinding the contract, and offering to return the stock.

The prayer is that the defendant may answer without his oath, that the contract and conveyance may be annulled, and the defendant be adjudged to pay the sum so received by him.

The answer denies all the specific allegations and charges concerning the state of mind of Copelin, and the defendant's knowledge thereof, and all the other facts relied on to show fraud or undue influence, and sets out at much length the circumstances of the purchase of three-fourths of the mine by the defendant, and his sale of one-half of his interest to Copelin; that the purpose and object of sale was in fact to procure the assistance of an able business man in Missouri; that Copelin was not known to him until this time, when he was introduced by a friend as being such a business man;

that Copelin examined the property and consulted with persons competent to advise him about the purchase; that the defendant made no representations as to value or profits, but referred him to his own examination for the former and to the treasurer of the company for the latter; that the mine was and is, in the opinion of the defendant and of experts, worth at least \$3,000,000, and that it was contracted to be sold to certain English purchasers for that price soon after Copelin had bought, and the negotiation for the sale was mentioned to Copelin, in case it should come to a result, which the defendant did not then think very probable; that this sale was not consummated for the reason that the laws of Missouri did not at that time permit land to be held by aliens, and not for any reason connected with its value; that the purchase by Copelin had been ratified by himself and his attorneys in fact; that one of those attorneys had refused to return the property to the defendant at cost, and he denies all combination, etc.

Copelin was attacked with a disease of the brain known to physicians as general paralysis of the brain, was put under special charge and treatment for this disease in 1873, and died of it in 1875. It is a progressive disease, always fatal. One of its early symptoms is a great extravagance of ideas and of conduct, often manifested in making foolish and unnecessary purchases. The point of difficulty in the case is that of time. When did Copelin cease to be a speculator and become a lunatic? The symptoms unfortunately are common to sane and insane people.

There was nothing in this particular purchase which would necessarily convict a person of insanity. A mine is certainly a very difficult piece of property to appraise, and opinions about this mine vary all the way from nothing to \$5,000,000 or \$6,000,000. But two things are clear—that those best acquainted with mining, and with this mine, put the highest value upon it, and not a single witness who depreciated it has any special knowledge about it; and an English company, upon the report by experts sent out for the purpose, agreed to buy it for \$3,000,000, and failed to conclude the

purchase for reasons not connected with any diminished confidence in its value. So far as market value can be predicated of such a piece of property, the weight of testimony is decidedly that it was worth all that Copelin paid for it. Whether it was wise or foolish to make such a purchase, would depend very much upon the amount which the purchaser could fairly afford to risk in a venture of the uncertain character of mining property, upon his willingness to wait for good times, if they became bad, and many other matters.

When the times changed, in 1873, great properties were lost, and many persons became bankrupt from the mere fall in market price of goods and lands, upon which they owed what they supposed to be a mere fraction of the true value. At the present moment those same properties may have recovered a considerable part of their former value. This mine was thus depreciated, and was sold for a very small price upon a foreclosure of a mortgage held by this defendant. In a letter printed in the record, the defendant attributes this loss, which the representatives of Copelin have suffered, to their having chosen to disavow the contract, instead of aiding him to pay the debt and preserve the property. With the foreclosure this case is not concerned.

There is no evidence of any fraud, misrepresentation, or undue influence on the part of the defendant. These allegations of the bill are unsupported, unless where they are disproved. There is no evidence that the defendant knew, or suspected, or had reason to know or suspect, that Copelin was of unsound mind; that the defendant sold the property to Copelin for more than he was ready to sell it for to others; that the transaction was in any respect, excepting its magnitude, different from any ordinary transaction of purchase and sale, so far as the defendant was concerned.

The sale was repeatedly ratified by Copelin and his attorneys, if he was capable of ratifying and of appointing an attorney. The complainants deny that a certain letter of the defendant to Copelin's attorney, Mr. Lackey, was an offer to rescind the bargain. It is not literally such an offer, but it is an intimation that the defendant has a right to rescind,

because Copelin has not taken charge of the business as he was expected to do, and Mr. Lackey's answer is an offer to rescind upon repayment of the money paid, with interest, and a considerable bonus. There were several other ratifications.

It was not until October, 1873, after the large profit of the English sale had failed to be realized, and after the change of time known as the "crisis" of that year had set in, that Mr. Copelin's friends procured him to be adjudged insane, and that the guardian wrote the letter avoiding this sale. Upon a remonstrance by the defendant, who wrote in vindication of the honesty of the transaction on his part, the guardian replied that the question was merely one of capacity to contract. The bill does not rely wholly upon the insanity of Copelin, but the evidence requires me to decide the case exclusively upon that point; because I am satisfied that the sale was not fraudulent, and that, if it were voidable for that cause, it has been ratified.

The plaintiffs maintain that Copelin was incapable of making or ratifying a contract in February, 1871, and incapable of appointing an attorney in July, 1871, when he went to Europe, and left full powers with Mr. Lackey.

It is not easy for the most honest and careful witnesses, looking back after an interval of years, to fix with any degree of accuracy the date of acts and conversations, each of which was wholly unimportant to them at the time; such as that six years or more ago they heard Copelin make an extravagant statement, or saw him do something odd and unusual. Most of the witnesses in this case decline to fix these reminiscences with positive dates. Certain things are proved, and certain things have not been proved. Copelin was a man of wealth and enterprise, largely concerned in business of various kinds, and having the control of still larger sums than he himself owned, belonging to his wife and her family. He was a director in many of the principal joint-stock companies in St. Louis. In the course of some months near about, but in most cases later than, the time of the purchase of this mine, he made other bargains of doubtful wisdom. In the

aggregate his speculations were very considerable, and it is probable that his family became alarmed. A great deal of evidence has been given to show on the one hand the extravagant character of these transactions, and on the other that they were not extravagant. The net result to his family, I fear, was a great loss.

In July, 1871, he went to Europe and traveled there some months for his health and recreation. In August, for the first time, a physician, expert in insanity, was consulted in Edinburgh. He pronounced Copelin insane, and in his deposition, (vol. 1, p. 177,) being asked his opinion, formed at the date of that examination, as to the length of time Mr. Copelin had been laboring under the effects of this disease, he says: "It is impossible to answer this question definitely. It may have existed a few months only, or a year or more. My opinion at the time was that it had existed several months." Whether by several months he meant six months, which would carry it back to about the date of the purchase, I do not know. All the other experts were consulted much later, and the weight of their opinion, so far as they are willing to express it, appears to be that it was possible, but not very probable, that the disease had begun as early as February, 1871.

The business of Copelin was conducted as usual until after his return from Europe. In December, 1871, and January, 1872, he resigned his several offices as president and director in the companies above mentioned. This may be taken as the time when he was found to be so clearly insane that the family and friends were obliged to make public admission of the fact. The three possible witnesses most competent to fix the exact dates—Copelin's wife, his mother-in-law, and his sister—have not been examined.

Taking these prominent and admitted facts into consideration, and reviewing the voluminous and detailed testimony in the record, I do not find it proved that Copelin was *non compos* February 10, 1871, nor that he was incapable of ratifying a contract after that time, or of making a power of attorney in July, 1871. I think a jury would not be war-

ranted in declaring that at the former of those dates he was incapable of transacting the ordinary affairs of life, or of making a will, or a contract of however solemn and important a nature.

These findings of facts make the disputed points of law unimportant. I ought to say, however, that the evidence of the defendant, taken in his own behalf, though not especially objected to at the time, is understood to be governed by a stipulation in the record that each party reserves all objections to matters of substance, and the complainant is right in insisting that by section 858 of the Revised Statutes the defendant's own evidence should not be received as to the transactions and conversations with Copelin personally. I have, therefore, not relied at all, in reaching my conclusions, upon testimony which comes within the prohibition of that section.

Bill dismissed, with costs.

BRYANT v. LEYLAND and others.

(*Circuit Court, D. Massachusetts.* March 1, 1881.)

1. PRACTICE—FILING INTERROGATORIES—BILL OF DISCOVERY.

Under the federal practice act, interrogatories, authorized by a state statute, may be filed in a federal court, in an action at law, in lieu of a bill of discovery.

2. SAME—CUMULATIVE REMEDY.

Such remedy is cumulative merely, and not adopted as a substitute or a bill of discovery.

3. SAME—DISCOVERY—ORAL TESTIMONY—REV. ST. § 861.

Section 861 of the Revised Statutes, which declares that the mode of proof in actions at common law shall be by oral testimony, does not refer to discovery, whether by bill or interrogatory.—[Ed.]

Action at Law. Motion that defendants be required to answer certain interrogatories, filed in the clerk's office, in accordance with the practice of the state.

T. F. Nutter, for plaintiff.

L. S. Dabney, for defendants.

LOWELL, C. J. In this action at law a motion is made that the defendants be required to answer certain interrogatories, filed in the clerk's office, in accordance with the practice of the state. Gen. St. c. 129, §§ 46-57. The cheap and easy substitute for a bill of discovery, which was adopted in Massachusetts in 1852, has proved to be useful, and the question is whether it is now part of the practice of the circuit court, by virtue of Rev. St. § 914. Another statute of the state, of still greater value, and much older, but later than the year 1780, when we first adopted the state practice, authorizes a court of law to appoint auditors in certain cases, and makes their report evidence. If these equitable powers, given to courts of common law, are not adopted, the circumstance is to be regretted; but the question seems to be a very doubtful one.

Speaking generally, the method of obtaining evidence to be used at a trial would be a part of the practice and modes of proceeding of the courts. It is so understood by congress, which gives the supreme court power to prescribe such modes of obtaining evidence and discovery as it may see fit, not inconsistent with any statute. Rev. St. § 917. This provision seems to me to weaken very much the argument so ably presented by Judge Dyer in *Easton v. Hodges*, 7 Biss. 324, that the legislation of congress is intended to cover the whole subject of evidence, and to exclude it from the domain of practice altogether. With much of that able opinion I agree, and I have no doubt that the decision in that case was sound. The adoption of the state practice is not intended to affect the courts of the United States, sitting in equity, in the slightest degree. There is no doubt that discovery is a branch of equity, and it follows that a cheap and easy substitute for a bill of discovery cannot take away the right of a suitor to file such a bill, if he is foolish enough to desire to do so. So of auditors: they are a convenient substitute for a bill in equity, and the power to appoint them in an action at law cannot deprive a plaintiff of the right to go into equity for an account. All this being granted, I am of opinion that when the state has enlarged the powers of the courts of law by giving them

some new writs or processes or forms or modes of proceeding or practice by which suitors can, if they see fit, obtain in a suit at law some of the advantages for which they must formerly have gone into equity, such forms are adopted by our practice act, not as substitutes, but as cumulative remedies for the benefit of such suitors as choose to avail of them.

I am not speaking of new subjects brought within the cognizance of courts of law, but of facilities for arriving at justice in matters clearly within the jurisdiction of such courts.

Upon this point I agree with the late Judge Johnson in *Bliss v. New Orleans R. Co.* 13 Blatchf. 227, a case closely analogous to the appointment of an auditor.

I agree that there must be nothing in the practice inconsistent with any statute. Therefore, if the state practice were that a deposition might be taken if a witness lives 20 miles from the place of trial, and the act of congress says 40 miles, the latter must prevail. So, as to the production of books and papers, the statute seems to me to assign the limits to our powers, (Rev. St. § 724;) and the practice act was not intended to interfere with this.

The practice act of 1872, § 5, (17 St. 197,) provided that nothing in that act should alter the rules of evidence under the laws of the United States. In re-enacting this section, this proviso has been dropped, and is not to be found anywhere in the Revised Statutes. The reason for omitting it may be assumed to be that the rules of evidence are no part of the practice, or forms or modes of proceeding, as they certainly are not in general, though the mode of obtaining evidence is. Still, that proviso was ruled by me, in a very important case, to have this effect: that if the practice of appointing auditors in an action at law had been adopted, as I should have inclined to think it had been, still, their report would not be *prima facie* evidence, in accordance with the statute of the state, and therefore there was no use in appointing an auditor. That proviso having disappeared, it is thought, by Judge Nelson and by me, that we have power to appoint an auditor in an action at law, and that his report

will be evidence. And we are further of opinion, that the statute power to file interrogatories, excepting for the production of books and papers, may be used instead of a bill of discovery. Section 861 of the Revised Statutes, declaring that the mode of proof in actions at common law shall be by oral testimony, does not appear to us to refer to discovery, whether by bill or interrogatory.

Motion granted.

FULLER, Trustee, *v.* FLETCHER and others.

(Circuit Court, D. Rhode Island. March 2, 1881.)

1. NEW TRIAL — VERDICT CONTRARY TO THE WEIGHT OF THE EVIDENCE.

A motion for a new trial will not be granted upon the ground that the verdict was contrary to the weight of the evidence, unless it clearly appears that the jury must have fallen into some important mistake, or must have departed from some rule of law, or must have made deductions from the evidence which were plainly not warranted by it.

2. SAME—SAME.

Therefore, where the verdict was, in substance, "We find for the defendant upon the general issue, and give no consideration to the special pleas," it was *held* that a motion for a new trial should be granted, where it was shown that the verdict was not warranted upon the evidence under the general issue, although it could have been sustained if the verdict had been simply for the defendant, without any mention of the special pleas.—[Ed.]

Motion for New Trial.

Richard B. Comstock and *Elisha C. Mowry*, for plaintiff.

William H. Greene, for defendants.

KNOWLES, D. J. The plaintiff in this case, against whom a verdict was rendered at the June term of this court, now moves that said verdict be set aside, and a new trial of said cause granted, upon three grounds, namely: *First*, that the verdict was against the evidence, and without evidence to support it; *second*, newly-discovered evidence; *third*, that the verdict was against the law as charged by the judge. Upon

the several points of fact and of law involved in these propositions the learned counsel of the parties have been fully heard, in able and elaborate arguments, occupying many hours of three successive days, and to those arguments I have willingly given the deliberate consideration to which they are entitled, as the utterances of astute and experienced counselors, upon topics with which they have made themselves familiar by diligent study. The results of that consideration it becomes my duty now to announce, and this at as small an expenditure of time and paper as may be consistent with intelligibility and precision.

And, *first*, of the first ground of the motion, "that the verdict was against the evidence, and without evidence to support it." Of a court's rights and duties of disposing of a motion for a new trial, when claimed upon this ground, I had occasion fully to treat in the case of *Hunt v. Poole*, reported in 1 Abbott's C. & D. Ct. Rep. 556. Such a motion I held was addressed to the discretion of the court, remarking, in conclusion, that in my judgment "it was no abuse of that discretion on the part of a Pennsylvania jurist, who, on the return of a verdict by a jury, on the instant exclaimed, 'Mr. Clerk, enter an order that the verdict be set aside. I wish it to be understood that in my court it requires a verdict from *thirteen* to rob a banking corporation.' " Nor was it, in my judgment, any abuse of that discretion on the part of our own Justice Curtis, when, at Newport, a motion for a new trial on the ground that the verdict was against evidence being tendered him by a very able and pertinacious member of the bar, he, without a moment's hesitation, said: "You can file your motion, Mr. C., but I overrule it now and at once, for I have heard the case tried and am satisfied with the verdict." To the views then expressed I still adhere, and would here refer as embodying the principles or rules which must guide me in passing upon the motion under consideration. These I found in the concurring rulings or declarations of Justice Story and Justice Curtis; the first saying, in 1 Sumner, 471: "I hold it to be my duty to abstain from interfering with the verdict of a jury unless the verdict is clearly against the
v.6,no.2—9

undoubted general current of the evidence, so that the court can clearly see that they have acted under some mistake, or from some improper motive, bias, or feeling." And Justice Curtis, saying in 1 Curtis, 64: "I hold it to be my duty not to interfere with the verdict of a jury as being against the evidence unless I can clearly see that the jury have unconsciously fallen into some mistake, or been actuated by some improper motive, in rendering their verdict." And again saying, in 2 Curtis, 16: "Now, what I have to determine upon this motion is whether I can clearly see that the jury must have fallen into some important mistake, or must have departed from some rule of law, or have made deductions from the evidence which are plainly not warranted by it."

Now, recognizing as sound the rule of conduct *deducible* from these utterances of Justices Story and Curtis, not to say prescribed by them, I am constrained to adjudge that, upon the ground firstly above stated, the said verdict should be set aside and a new trial granted; for I cannot but clearly see that the jury must have fallen into some important mistake, or must have departed from some rule of law, or have made deductions from the evidence which are plainly not warranted by it, and consequently cannot but sustain the motion. Had the verdict of the jury been simply for the defendant, without special mention of either of the two pleas in the case, it may be conceded there would have been no tenable ground for impeaching it as against the evidence. The verdict would have been regarded as the resultant of the jury's deliberations upon all the evidence submitted to them, and with their finding the court might well decline to intermeddle. But such, it is agreed, was not their verdict. "We find for the defendant upon the general issue, and give no consideration to the special pleas," was in substance their verdict, which, with the assent of the learned counsel of the parties, the court not interposing, was affirmed and recorded in these words: "In the above suit the jury find that the defendants are not guilty of the trespasses, or any part thereof, in manner and form as the plaintiffs have alleged in their declaration." And in view of these facts and this state of the record, the plaintiff now

claims that inasmuch as the verdict was rendered upon the general issue, solely and exclusively, it should be set aside if it is shown that upon the evidence in the cause, relevant and proper under the general issue, (excluding from consideration whatever was admissible or admitted under a special plea of possession,) the verdict is unwarranted. This, in my judgment, is satisfactorily shown.

And here I am aware that with the approval of one of the parties, but not to the gratification of his antagonist, and in accordance with the practice of some of my brethren of the bench, I might here indulge in an argumentative review of the whole case, involving of course a recapitulation of much of the testimony submitted, an analysis and exposition of much of a large mass of documentary evidence, with remarks and suggestions touching the admissibility and positive and relative weight of that evidence upon the issues raised and contested, and might superadd to these such critical remarks in vindication of my rulings as might seem to me pertinent, approbatory or otherwise, of the antagonistic utterances *arguendo* of the learned counsel of the parties respectively. But from this I refrain, as in this case, manifestly, a work of supererogation, profiting no one, and of interest to none but the learned counsel, if even to them. Of the soundness or unsoundness of the conclusions to which I have arrived upon the motion pending, they, the counsel, are alone qualified to judge, and they alone, it is probable, will ever form, entertain, or express an opinion upon this point. Unanimity on their part, even were it desirable, is not reasonably to be expected, no matter how elaborate and persuasive the argument the court might submit in support of its conclusions.

Finding and ruling that upon the first ground the plaintiff is entitled to a new trial, upon the second and third grounds I express no opinion.

The verdict is set aside and a new trial granted.

NATIONAL BANK OF RISING SUN, INDIANA, *v.* BRUSH and
another.

(Circuit Court, D. Indiana. March 8, 1881.)

1. NEGOTIABLE PAPER—WANT OF CONSIDERATION—EVIDENCE.

Want of consideration may be shown as between the parties to negotiable paper and others having notice.

2. SAME—SAME—INDORSER.

Therefore an indorser may show that he became a party to the paper without consideration, in a suit by the holder with notice.—[ED.]

Action on Promissory Note. Demurrer.

Baker, Hord & Hendricks, for plaintiff.

Kennedy & Brush and *E. C. Snyder*, for defendants.

GRESHAM, D. J. The National Bank of Rising Sun, Indiana, sues John C. Brush, as maker, and William T. Brush, as indorser, of a negotiable promissory note for \$8,000, executed May 23, 1877, and payable to the latter 12 months after date. The note contains a clause whereby the maker and indorsers severally waive presentment for payment, protest, and notice of protest and non-payment, and all defences on the ground of any extension of the time of payment that may be given by the holder to the maker or indorsers.

In the first paragraph of his separate answer, after admitting that he indorsed the note to the plaintiff, William T. Brush avers that the plaintiff agreed to loan to John C. Brush the sum of \$8,000, which he was to secure by executing a mortgage upon specified real estate; that the act of congress under which national banks were organized did not permit them to loan money and secure the same by taking mortgages directly to themselves, and for that reason it was agreed between the plaintiff and John C. Brush that the latter should execute to some third person his note for \$8,000, and also a mortgage upon specified real estate to secure the payment of the same, which person should indorse the note and thereby transfer the mortgage to the plaintiff; that, pursuant to the agreement, John C. Brush executed to William T. Brush the note in suit, together with a mortgage to secure its payment,

and, after the latter had indorsed the note in blank, John C. Brush took the same, and delivered it and the mortgage to the plaintiff, and received the money; and that William T. Brush indorsed the note for no other purpose than to enable the plaintiff and John C. Brush to carry out their agreement.

The second paragraph is the same in substance as the first. There is a demurrer to the first and second paragraphs of answer. It is insisted, in support of the demurrer, that by his separate answer William T. Brush seeks to contradict or vary his contract of indorsement by parol evidence. The facts stated in the first and second paragraphs of the answer are admitted to be true, and they show that William T. Brush indorsed the note solely for the convenience of the bank and John C. Brush, and without consideration. William T. Brush was the mere instrument of John C. Brush and the bank, to enable the latter to loan its money on mortgage security. It was well understood by all the parties that William T. Brush was not interested in the loan, and that he was not an ordinary accommodation indorser. The money was not loaned on the faith of his signature on the back of the note. He acted as the trustee of the bank, if he held the note and mortgage at all. The act of congress prohibited national banks from loaning money on mortgage security, and it was supposed that prohibition might be evaded by executing the note and mortgage to William T. Brush, and having him assign the same to the bank. As between the parties to negotiable paper and others having notice, the want of consideration may be shown. This is not a suit between an innocent holder of the note for value and the indorser. The indorser should be allowed to prove the facts stated in his answer, if he can, not to contradict or vary the terms of the contract of assignment, but to show that he became a party to the paper without any consideration whatever. *Barton v. Martin*, 52 N. Y. 575; *Ross v. Espey*, 66 Pa. St. 487. Having thus induced William T. Brush to indorse the note, it would be upholding a fraud to allow the bank to hold him liable as an indorser.

Demurrer overruled.

UNITED STATES v. THE CENTRAL NATIONAL BANK OF PHILADELPHIA.*

(District Court, E. D. Pennsylvania. February 7, 1881.)

1. PAYMENT OF CHECK BY UNITED STATES ON FORGED INDORSEMENT—
DUTY OF GOVERNMENT TO GIVE NOTICE IN REASONABLE TIME—
FORFEITURE OF RIGHTS BY DELAY.

The failure of the United States to give notice of the forgery of an indorsement of a check on the treasury within a reasonable time after the payment of the check will bar its recovery of the money from the person to whom the check was paid.

2. SAME—GOVERNMENT BOUND BY SAME RULES AS INDIVIDUALS.

The government, when dealing with commercial paper, is bound to observe the same rules respecting vigilance that are enforced against individuals.

Assumpsit by the United States against the Central National Bank, to recover the amount of the following check paid by plaintiff to defendant upon a forged indorsement:

"No. 6640.

WASHINGTON, March 24, 1868.

"Assistant treasurer of the United States pay to the order of Jos. Barr one hundred dollars.

"\$100.

C. HOLMES,

"Paymaster U. S. A.

[Indorsed]—"JOSEPH BARR,

"JAS. BARR,

"JAMES M. SELLERS."

The check had been presented and paid in due course. Sometime between May 27, 1879, and July 26, 1879, the United States received notice that the indorsement of the name of James Barr was a forgery, and on July 31, 1879, brought this suit to recover the amount of the check. No notice of the forgery had been given to the defendant prior to the bringing of suit.

The court directed a verdict for plaintiff, subject to the decision of the court upon the following point of law reserved,

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

viz.: that "the United States was bound to give notice to the defendant of the forged indorsement within a reasonable time after the check came into its hands and was paid by it, and its failure to give such notice and make claim on the defendant amounts to such negligence as will bar a recovery." Defendant moved for judgment *non obstante veredicto* on the point reserved. *McKenna*, C. J., was present at the argument of the rule.

John K. Valentine, U. S. Dist. Att'y, for plaintiff.

Edward L. Perkins, for defendant.

BUTLER, D. J. Judgment must be entered for the defendant on the reserved points. The case is ruled by the *U. S. v. Cooke*, decided in this court in 1872: 9 Phila. Reps. 468.* I do not find any case inconsistent with this, unless it be the *U. S. v. The Second Nat. Bank of Jersey City*, decided in the New Jersey district in 1872. That case involved the point. The question does not appear to have been pressed, however, by counsel, or considered by the court. No good reason can be assigned for relieving the government, when dealing with commercial paper, from observance of the rules respecting vigilance, which are enforced against individuals; that this view is entertained by the supreme court, is plainly indicated by the case of *Cooke v. U. S.* 91 U. S. 397.

*This case was argued before the late Judge Cadwalader, and the opinion delivered by him, but it was understood that *McKenna*, C. J., concurred therein.

UNITED STATES *v.* ROSE.**(Circuit Court, S. D. Ohio. March 7, 1881.)***1. FEDERAL JURIES—TALESMEN—ACT OF JUNE 30, 1879—REV. ST. § 804—CONSTRUCTION.**

The act of congress of June 30, 1879, prescribing the mode in which juries shall be drawn in the United States courts, did not, either expressly or impliedly, repeal section 804 of the Revised Statutes; and therefore when, from challenges or otherwise, there is not a petit jury to determine any cause, the court may direct the marshal to fill the panel from the bystanders.

Motion for New Trial.

The defendant was indicted for violation of the internal revenue law. When the case was called for trial, and a jury was being empanelled, the defendant, in the exercise of his right of challenge, challenged from the jury some of the jurors who had been regularly drawn and summoned as jurors for the term. To fill the vacancies occasioned by these challenges the court directed the marshal to fill the panel by calling persons from the bystanders. The defendant objected to this, and demanded that the panel should be filled by persons whose names should be drawn by the clerk and jury commissioner, as provided in the second section of the act of June 30, 1879, (21 St. at Large, 43.) But the court overruled this objection, and the panel was filled by persons called by the marshal from the bystanders, and the trial progressed and the jury returned a verdict of guilty against the defendant. Thereupon the defendant moved the court for a new trial, assigning as a reason therefor the error of the court in causing the panel to be filled from the bystanders.

T. C. Campbell and H. B. Banning, for motion.

Channing Richards, Dist. Att'y, *contra*.

SWING, D. J. The language of section 2 of the act of June 30, 1879, in regard to the manner in which juries shall be selected, is: "And that all such jurors, grand and petit, including those summoned during the session of the court, shall be

* Reported by Messrs. Florian Giaouque and J. C. Harper, of the Cincinnati bar.

publicly drawn from a box containing at the time of each drawing the names of not less than 300 persons possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court, and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held, opposing that to which the clerk may belong; the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein." This act in terms repeals sections 800, 801, 820, and 821 of the Revised Statutes of the United States.

Section 804 of the Revised Statutes of the United States provides: "When from challenges or otherwise there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel." This section is not repealed in terms by the act of June 30, 1879, nor do we think it is repealed by implication. The language of the latter law is that "all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box," etc. The calling of jurymen from the bystanders sufficient to complete a panel, under the order of the court, is not a summoning of jurors in the sense in which the term "summoned" is used in the act of June 30, 1879. They cannot, therefore, be said to be in conflict with each other. Besides, if such were the construction, the inconvenience and delays to the court in the transaction of business would be incalculable. The person whose name may be drawn from the box by the clerk and jury commissioner may reside 150 miles from the place where we are holding court. This would involve a delay for a time sufficient to enable the marshal to summon such person and to enable him to come to the place where the court is held. It

certainly was not in contemplation of congress that a construction working such inconvenience should be given to the law.

We think the language of the act of June 30, 1879, and, particularly so when taken in connection with section 804 of the Revised Statutes, will not authorize the construction claimed for it by defendant's counsel, and that, wherever by reason of challenge there is not a petit jury, it is within the province of the court to direct the marshal to complete the panel by calling a sufficient number of jurymen from the bystanders.

The motion for new trial will be overruled.

HEIDRITTER v. ELIZABETH OIL-CLOTH Co.

(Circuit Court, D. New Jersey. March 5, 1881.)

1. FORFEITURE—PROPERTY USED AS A DISTILLERY.

Premises occupied and used as a distillery are liable to forfeiture for the violation of sections 7 and 19 of the act of July 20, 1868, (15 St. 127, 132,) in relation to distillers' bonds and books of account, without regard to the culpability of the owner of the property.

2. SAME—DECREE OF CONDEMNATION.

A decree of condemnation under such forfeiture relates back to the time when the acts were committed which incurred the forfeiture.

3. SAME—MECHANIC'S LIEN.

A mechanic's lien cannot be enforced in a state court, where the premises have been seized by the marshal under such forfeiture proceedings before the claim has been filed.—[Ed.]

In Ejectment.

Edward A. Day, (W. H. Corbin, with him,) for plaintiff.

W. R. Wilson, (Brown & Williamson, with him,) for defendant.

Nixon, D. J. This is an action of ejectment brought to recover the possession of eight lots of land in the city of Elizabeth and state of New Jersey. The parties having formally waived a jury, the case has been tried before the court.

I find as facts in the case:

(1) That the premises in controversy, being the property of one Edward G. Brown, were transferred by the said Brown to Charles L. Sicher, by deed of conveyance bearing date on the twentieth of August, 1872.

(2) That the premises were occupied and used by the said Sicher as a distillery, and were seized by the revenue officers of the United States on the twenty-fourth of January, 1873, for alleged violations of the revenue laws of the United States.

(3) That an information was filed by the United States against the said real estate, *inter alia*, on the fourth of February, 1873, and a decree of condemnation was entered by default, in the district court of the United States for the district of New Jersey, on the twenty-fifth of February, 1873; that a sale thereof took place on the twenty-second of May following, when the said Edward G. Brown became the purchaser for the consideration of \$1,500, and that a conveyance was executed and delivered to the purchaser, for the said premises, on the twenty-ninth of May, 1873.

(4) That Edward G. Brown sold and conveyed the same to the Easton Manufacturing Company, on or about December 17, 1874, and that the defendant corporation claims title by sundry *mesne* conveyances since that date.

I further find as facts in the case:

(5) That while the said Charles L. Sicher had the possession of the said premises, and before he received a deed therefor, to-wit, on the twenty-fifth of June, 1872, he commenced the erection of a building thereon.

(6) That on the twenty-first of February, 1873, the plaintiff, Heidritter, filed a claim in the clerk's office of the county of Union for \$1,711.22, for materials furnished in the erection of said building from June 21 to August 23, 1872; that on the same day he caused to be issued a summons on said claim, and that on the fourteenth of June following a judgment was entered thereon in the circuit court of the county of Union.

(7) That on the thirteenth of March, 1873, one Ferdinand

Blanke filed another mechanic's lien claim in the same office for \$264.35, for materials furnished for the same building from September 7 to December 30, 1872; that a summons was issued thereon March 15, and final judgment entered June 18, 1873.

(8) That on the twenty-fourth of September, 1873, the premises in controversy were sold by the sheriff of the county of Union, under these lien judgments, to the plaintiff in this suit for the consideration of \$100, and a deed duly executed to him therefor.

It will be perceived that both parties claim title to the land in dispute through Charles L. Sicher,—the defendant, under and through a deed from the United States marshal, given upon a sale of the property, under a decree of forfeiture and condemnation to the use of the United States, in the district court for New Jersey; and the plaintiff, under a deed from the sheriff of the county of Union, given upon a sale by virtue of two judgments upon lien claims in the circuit court of the county of Union. These facts present for consideration questions of great importance, and involve the construction of the acts of congress in regard to the forfeiture of real estate on account of violations of the internal revenue laws of the United States. I have carefully examined the several sections alleged to have been violated, in the information filed for the forfeiture and condemnation of the land and premises in dispute, and also the mechanic's lien law of the state of New Jersey, under the provisions of which the plaintiff claims to have derived his title, and will briefly state the conclusions of law to which I have arrived.

I am of the opinion—

(1) That while, possibly, by the phraseology of section 44 of the act of July 20, 1868, (which has been re-enacted in the Rev. St. § 3281,) only the right and interest of the owner of inculpatated distillery premises can be condemned and forfeited,—no such limitation on the right of forfeiture is found in either section 7 (section 3260, Rev. St.) or section 19 (sections 3303–5, Rev. St.) of the same act, under both of which the property in controversy was condemned by default,—and

that it seems to have been the clear intention of congress, in these sections, to forfeit the thing, when proved to be an offender, without regard to the owner's culpability, or to the interest of outside parties. To this effect was the opinion of the late Judge Woodruff in *U. S. v. The Distillery at Spring Valley*, 11 Blatchf. 255, reversing the district court, and I see no good reason to hold differently. See, also, *U. S. v. Distilled Spirits, etc.*, 8 Int. Rev. Rec. 81, and *Dobbins' Distillery v. U. S.* 96 U. S. 399, where it is declared that the privity or consent of the persons interested in the offending property was not in any degree necessary, in order to include their interests in the forfeiture.

The whole legislation of congress shows a disposition and intention, under different circumstances, to distinguish between forfeiting the thing itself and forfeiting particular rights or interests in the thing. This observation is illustrated by comparing the phraseology used in sections 3260 and 3305 with that employed in sections 3063 and 3281.

2. That while the decree of condemnation in favor of the United States was not made and entered in the district court until February 25, 1873, the real estate was in fact seized by the officers of the revenue on the twenty-fourth day of the preceding January, and the forfeiture to the government related back to the time of the commission of the acts incurring the forfeiture, and the title to the property from that moment vested in the United States. *Henderson's Distilled Spirits*, 14 Wall. 56, in which case the supreme court says: "Where the forfeiture is made absolute by statute the decree of condemnation, when entered, relates back to the commission of the wrongful acts, and takes date from the wrongful acts, and not from the date of the sentence or decree." This has ever been the uniform rule in this country, in which our courts have followed the long-established doctrine of the English courts. *Wilkins v. Despard*, 5 T. R. 112; *U. S. v. 1,960 Bags of Coffee*, 8 Cranch, 398; *Gelston v. Hoyt*, 3 Wheat. 311; *U. S. v. Distillery*, 21 Int. Rev. Rec. 166; *U. S. v. 56 Barrels*, 6 Am. Law Reg. (N. S.) 37.

3. That the mechanic's lien law of New Jersey, under the

provisions of which the plaintiff claims to have acquired his title, requires that the claim filed in the clerk's office of the county shall contain the name of the owner of the property at the time of filing, and that the summons issued to enforce the lien shall be against such owner, as well as the builder; and that inasmuch as the owner of the real estate in controversy is divested of all his interest therein, and the title to the same vests in the United States at the time of the commission of the act or acts which cause the forfeiture, it does not seem unreasonable that all subsequent proceedings by leinors to charge the property with the lien, should be held inoperative and void against the United States, unless it were made a party to the proceedings as owner.

4. But, whether this be so or not, I am of the opinion that under the proceedings *in rem*, to give effect to the forfeiture, all persons claiming liens against the *res* were notified to come in and establish their liens; that after seizure by the marshal the property was in the possession of the court for that purpose; that whilst, by such proceedings, the lien upon the *res* was divested by the sale, it attached at once to the fund in court which was realized by the sale; and that the claimants mistook their remedy by going into the state courts to enforce their liens, and should have applied to the district court, where the property was, to be allowed to participate in the proceeds of its sale to the extent of their claims; and that, if their failure so to do has resulted in their loss, no blame can attach to the government, which afforded them ample opportunity for a judicial consideration of their claims. Whether the liens attached to the premises, notwithstanding the forfeiture, it is not necessary here to decide. The question was raised and discussed by Judge Dillon in the case of the *U. S. v. Macoy*, 2 Dill. 299, and left by him unadjudicated.

5. Entertaining the foregoing view, I am further of the opinion that the plaintiff is not entitled to recover in this suit, and that a judgment must be entered for the defendant, with costs.

RUNKLE v. CITIZENS' INS. CO. OF PITTSBURGH, PENNSYLVANIA.*

(Circuit Court, S. D. Ohio. February, 1881.)

1. REVENUE LAW—DISTILLER—ASSESSMENT FOR MATERIAL USED IN EXCESS OF CAPACITY.

If a distiller uses material for distillation in excess of the estimated capacity of his distillery according to the survey, but, in the regular course of his business, pays the tax upon his entire production, he cannot be again assessed the regular gallon tax on the spirits which the excess of material used should have produced.

Stoll v. Pepper, 97 U. S. 438.

2. SAME—SAME—SAME—VOID—ATTACKED COLLATERALLY.

An assessment therefor, and all proceedings taken thereunder, are void, and may be attacked collaterally.

3. FIRE INSURANCE — APPLICATION FOR—LIENS — ILLEGAL ASSESSMENT AND LEVY.

A policy of insurance required that liens upon the property insured should be disclosed in the application therefor, and provided that a failure to do so would avoid the policy. *Held*, that such illegal assessment, and a seizure of the insured property thereunder, did not create a lien thereon, the non-disclosure of which would avoid the policy.

4. SAME—POLICY — CHANGE OF POSSESSION—LEGAL PROCESS — ILLEGAL ASSESSMENT AND SALE.

The policy also provided "that if any change take place in the * * * possession of the property by legal process. * * * it shall avoid the policy." *Held*, that such illegal assessment, and a seizure and sale of the insured property thereunder, were not a change of possession by legal process.

5. SAME—SAME—"LEGAL PROCESS."

The phrase "legal process" means *valid* legal process.

6. FIRE INSURANCE—POLICY—CANCELLATION.

The right to terminate, by cancellation, a contract of insurance which has been fairly entered into, and has taken effect, can be exercised by either party, only by a strict compliance with the provisions of the policy relating thereto.

7. SAME—SAME—SAME—BURDEN OF PROOF.

The burden of proving a cancellation is upon the party claiming that the contract has been terminated.

8. SAME—SAME—SAME—SUFFICIENT EVIDENCE.

And where the policy provided that the company might terminate the insurance "by giving notice to that effect and refunding a rata-

*Reported by Messrs. Florian Glauque and J. C. Harper, of the Cincinnati bar.

ble proportion of the premium for the unexpired term of the policy," *held*, that the company must show that it had given the assured notice that the policy was cancelled, and that it had paid or tendered him such portion of the premium; and notice that the policy would be cancelled, or a promise to pay, or a request to call for, the premium, is insufficient.

9. SAME—SAME—SAME — POWER OF AGENTS — DELEGATUS NON POTEST DELEGARE.

Agents of an insurance company cannot delegate to others the power to cancel a policy; but it is not necessary that they should, in person, deliver the notice and pay or tender the return premium.

Taft & Lloyd and L. Geiger, for plaintiff.

C. D. Robertson, for defendant.

SWING, D. J., (*charging jury*.) The action in this case is brought by the plaintiff upon a policy of insurance issued by the defendant to the plaintiff on the eighteenth day of May, 1878, insuring plaintiff against loss and damage by fire upon a mill and distillery to the amount of \$1,000. The defendant denies liability for the reason that the policy made the application a part of it, and provided that if any untrue answers or statements were made the policy should be void; that prior to the application a tax had been assessed by the commissioner of internal revenue against the plaintiff; that a distrain warrant had been issued upon such assessment, and the distillery had been seized by virtue thereof, and that said tax was therefore a lien upon said property; and that in the statements and answers in regard to liens this lien was not disclosed. The defendant also claims that by the policy it is provided that if the possession of the property should be changed by legal process the policy should be void, and that by virtue of said tax and distrain the property was seized by an officer of the government, who sold the same, by which the possession was changed. The defendant further claims that the policy was cancelled. The plaintiff, by reply, denies the legality of the assessment of taxes, the issuing and levy of the distrain warrant, and the sale by virtue thereof, and denies the cancellation of the policy.

It appears from the evidence in the case that the plaintiff was a distiller prior to the issuing of the policy; that before

he commenced business a survey of his distillery had been made, and its true spirit-producing capacity had been estimated and determined, and reported in accordance with the provisions of, and regulations under, the internal revenue laws. It further appears that for a short period of time the distiller had produced spirits in excess of the surveyed capacity of the distillery; that all the spirits produced by him, including the excess, were drawn from the receiving cisterns and placed in the government warehouse, were duly reported and assessed, and that the taxes upon all of said spirits thus produced had been paid, and that the commissioner of internal revenue had made an assessment of 70 cents on the gallon for the spirits produced in excess of the surveyed capacity, and directed the collection thereof; that the collector had placed this upon his list and had issued his distraint warrant, under which he had seized the distillery and sold it; and that some months after, and before the fire, the plaintiff had paid the amount of the taxes thus assessed, with interest, penalty, and costs, and had applied to the government to have them refunded. If this tax was legally assessed, it had undoubtedly, by the provisions of the law, and the seizure and levy upon it by the distress warrant, become a lien upon the property which the plaintiff should have disclosed under his application; but whether it was legally assessed will be discussed in connection with the provision of the policy in regard to the change of possession. The policy provided "that if the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, it shall avoid the policy." The language of this provision is "legal process or judicial decree." If this tax had been legally assessed against the property, and the distraint was legally issued, and the property seized by virtue of the distraint, and possession taken thereof, and a sale made under these proceedings, by which the possession was changed, then it would be a change of possession by virtue of legal process which would work a forfeiture of the policy.

It is contended by the defendant that the change of possession does not depend upon the legality of the assessment of these taxes, there having been in fact a distraint warrant issued and the property seized under it and sold; that the possession was thereby changed by legal process. I cannot agree with learned counsel for defendant in this proposition. The change of possession which should work a forfeiture of this policy should not only be a change of possession in fact, if it be by virtue of legal process, but it must have been a change of possession by virtue of valid legal process. If it were not a valid legal process it would be of no binding force upon him or anybody else. The parties did not contemplate by this provision any change of possession which might be brought about by proceedings in the nature of legal proceedings, or under the forms of law. It could not have been contemplated by the parties that if an officer of the court should take an execution issued without judgment, and levy it upon and sell this property, that this would have been a change of possession by legal process. Such a process would not be legal. And so in this case, if there had been no legal assessment of taxes by the commissioner of internal revenue, if, under the law, he had no power to make such an assessment of taxes as that upon which the distraint warrant issued by which this property was seized and sold, the issuing of the distraint warrant, the seizure of the property by virtue of it, and the sale under it, were, as to this plaintiff, void.

It is said, however, by counsel for defendant that the invalidity of this assessment cannot be shown by the plaintiff in this proceeding; that it cannot be attacked collaterally; that it can only be reached by appeal to the commissioner of internal revenue. The nature and character of these assessments were very fully discussed in the case of *U. S. v. Clinkenbeard*, 21 Wall. 65. In that case the court below held as is claimed by the defendants. The case was taken to the supreme court of the United States upon error, and the judgment of the court below was reversed. Justice Bradley, in delivering the opinion of the court, speaking of the nature of

such assessments, says: "Is he precluded by any general rule of law from setting up such a defence? Has an assessment of a tax so far the force and effect of a judicial sentence that it cannot be attacked collaterally, but only by some direct proceeding, such as an appeal or *certiorari*, for setting it aside? It is undoubtedly true that the decisions of an assessor or board of assessors, like those of all other administrative commissioners, are of a *quasi-judicial* character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal, and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor."

In the case of *Stoll v. Pepper*, 97 U. S. 438, a case which involved the validity of an assessment for overproduction of spirits precisely as in this case, the supreme court held: "If a distiller uses material for distillation in excess of the estimated capacity of his distillery, according to the survey made and returned under the provisions of the law regulating that subject, but in the regular course of his business pays the taxes upon his entire production, he cannot be again assessed at the rate of 70 cents on every gallon of spirits which the excess of material used should have produced according to the rules of estimation prescribed by the internal revenue law." This decision is conclusive upon the question of the illegality of the assessment in this case. The commissioner had no legal power or authority, under the facts of this case, to make the assessment. All the proceedings which followed the assessment were therefore illegal, and of no binding force or effect against the plaintiff. The possession was therefore never changed by virtue of "legal process." Such proceedings had no effect upon the policy. And referring back to the first defence they did not create such a lien upon the property, the non-disclosure of which would avoid the policy. That such proceedings may be attacked collaterally I think

there can be no doubt. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light & Coke Co.* 19 Wall. 58.

It is claimed by defendant that it is not liable because it had cancelled the policy of insurance. The policy contains, among other provisions, the following: "It is also a condition of this insurance that it may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company by giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." It is within the province of the parties to a contract of insurance to stipulate in the policy that the assured may at any time terminate the contract and surrender the policy, and be entitled to a ratable portion of the unearned premiums; and that the insurer may at any time at its option terminate the contract and cancel the policy by giving notice to the assured to that effect, and paying to him a ratable portion of the premium for the unexpired term. This policy of insurance contains such a stipulation. The right, however, to terminate a contract of insurance which has been fairly entered into, and has taken effect, by this method, is a right which can only be exercised by either party by a strict compliance with the terms of the policy relating to cancellation. Where such a contract has been entered into and has taken effect, and either party claims that the contract has been terminated and put an end to by virtue of such provisions, it devolves upon such party to establish by the evidence that the contract has thus been terminated; and so in this case, the defendant claiming that the contract has been terminated, it must satisfy your minds by the evidence that it had given the plaintiff notice of the cancellation of the policy, and that it had returned or tendered to him a ratable portion of the premium for the unexpired term of the policy. The notice must not be that the policy would be cancelled in the future, but that it is cancelled, and the payment of the premium

must in fact be made or tendered. A promise to pay it in the future is not sufficient, nor is a request that the party call and receive it sufficient; it must in fact be paid or tendered to the party. In this case the policy was issued by Adam Gray & Co., who were the general agents of the defendant, and a question is made whether a general agent who issues a policy has the power of cancellation; but as it is admitted that there was a special authority given them by the company to cancel the policy, it is not necessary to determine that question. The facts in this case show that the notice and tender of premium, if any was given and made, was not given or made in person by Adam Gray & Co., but by one Elliott; and it is claimed by the plaintiff that although Adam Gray & Co. had the power of cancellation, that Elliot possessed no such power; that it was a power which could not be delegated by Adam Gray & Co. to Elliot. The general proposition that such power could not be delegated is certainly true. *Delegatus non potest delegare*. If, therefore, you find that Adam Gray & Co. had attempted to delegate this power to Elliott, and, acting under that authority, he had attempted himself to cancel the policy by virtue of such authority, it would not amount to a cancellation of the policy.

If, however, Adam Gray & Co., acting under their authority from the company, and for the company, prepared the notice of cancellation as their act for the company, or the act of the company through them, and provided the money to be paid by them for the company, it was not necessary that they should in person have delivered to the plaintiff the notice, and paid or tendered to him the money. They could have these things done by Elliot. "Such service would not be of such a personal character as to come under the maxim," *delegatus non potest delegare*. May on Insurance, 154. Such delivery of notice and tender or payment of the money by Elliott would be a cancellation of the policy.

SCHMEIDER and others v. BARNEY.

(Circuit Court, S. D. New York. March 12, 1880.)

1. IMPORTS—APPRAISED VALUE—PENAL DUTY.

If an invoice of imported goods comprises several items of the same kind and description, and one or more items are found to have been undervalued, the penal duty will be imposed upon all the items of the same kind and description, if the appraised value exceeds by 10 per cent. the aggregate entered value of such items.

2. SAME—LADIES' DRESS GOODS—CLASSIFICATION.

Ladies' dress goods do not constitute items of the same kind, within this rule, where they differ so much in price, figures, and arrangement of colors as to be classified and known to the trade by different names.

3. SAME—CORRECTED INVOICE—VALUATION.

The valuation of such importations should be made on the corrected invoice, received and accepted by the collector before the appraisement of the goods.—[Ed.]

Almond W. Griswold, for plaintiffs.

Thomas Greenwood, Ass't U. S. Att'y, for defendant.

SHIPMAN, D. J. In this case a verdict was directed for the plaintiffs, subject to the opinion of the court upon the questions of law which are involved. I had intended to give the facts at length, but am not able to devote the necessary time to that labor. There were 16 cases of worsted, and worsted and cotton, goods in the invoice. The goods were of six different styles, each style being distinguished by its peculiar name, such as Latona or Parthenia, and each class had its own value. I suppose that all the goods were ladies' dress goods.

The corrected invoice was made and received before any appraisal, and was accepted by the collector as the true invoice, who also amended the plaintiffs' original entry to correspond with the corrected invoice. The appraisers did not advance cases 2007 and 2014, containing goods called Titania, above the corrected invoice, and no additional duty was levied upon these cases. The advance upon each of the other 14 cases was 10 per centum above the value of that stated in the original invoice, but was not 10 per centum

above the value stated in the corrected invoice in the five cases containing Parthenias and Valerias. The aggregate advance by the appraisers on the whole invoice was more than 10 per centum above the aggregate valuation in the original, as well as in the corrected, invoice. An additional duty of 20 per cent. was levied upon all the goods, except upon cases 2007 and 2014. The duty was levied under the second section of the act of March 3, 1857, (11 St. at Large, 199.)

1. The valuation of the importations was properly made on the corrected invoice. *Howland v. Maxwell*, 3 Blatchf. 147.

2. There not having been an increase of 10 per cent. above the valuation, as declared on the entry of the Parthenias and Valerias, the penalty of 20 per cent. was not properly levied upon these goods.

I think that article 488 of the treasury regulations contains the true rule: "When the invoice comprises several articles, and any one of them is undervalued 10 per cent. or more, the additional duty will attach on such article without regard to the result of the appraisal of the other articles, except where an invoice comprises several items of the same kind and description of goods, and one or more items are found to be overvalued to the extent mentioned, but without bringing the aggregate value of the importations to a sum greater, by 10 per cent., than the entered value."

I understand the rule to be, if an invoice comprises several items of the same kind and description of goods, and one or more items are found to have been undervalued, the penal duty will be imposed upon all the items of the same kind and description, if the appraised value exceeds by 10 per cent. the aggregate entered value of such items.

All these goods were of the same general materials, and were used for the same purpose, but they were of different kinds and descriptions; that is to say, they were of such different style and character as to be classified by different trade names. The mere facts that the goods varied in prices, or were of different figures or arrangement of colors, would not make them of different descriptions; but the fact that the

goods varied in these characteristics so much as to be classified and to be known in the trade by different names, is significant of the difference in the character and description of the goods. There was no dispute upon the facts. Neither party asked to go to the jury, but each claimed that it was entitled to a direction as matter of law.

Let judgment be entered upon the verdict.

UNITED STATES *v.* WATKINS.

(Circuit Court, D. Oregon. March 11, 1881.)

1. INDICTMENT—KNOWINGLY.

An indictment for voting without having a lawful right to vote, contrary to section 5511, Rev. St., should contain an allegation that the defendant "knowingly" so voted, even if the possession of such knowledge by him is a mere question of law.

2. CONVICTION OF CRIME — FORFEITURE OF THE PRIVILEGE OF AN ELECTOR.

The constitution of the state of Oregon (article 2, § 3) declares that "the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in the penitentiary." The defendant was indicted for an assault with a dangerous weapon, contrary to section 536 of the Oregon Criminal Code, which crime was thereby made punishable by fine or imprisonment in the jail or penitentiary, in the discretion of the court, to which accusation he pleaded guilty, and was sentenced to pay a fine of \$200. Afterwards, on June 7, 1880, the defendant voted for representative in congress at an election held in Madison precinct, Oregon. *Held*, (1) that the term "conviction," as used in the constitution of Oregon, *supra*, is used in its primary and ordinary sense, and signifies a proving or finding that the defendant is guilty, either by the verdict of a jury or his plea to that effect, and does not include the sentence which follows thereon; (2) that a crime "is punishable by" imprisonment in the penitentiary when by any law it may be so punished, and the fact that it also may be or is otherwise punished, does not change its grade or character in this respect; (3) that the defendant was convicted, by his plea of guilty, of a crime punishable by imprisonment in the penitentiary, and thereby forfeited his privilege as an elector under the constitution of Oregon; and (4) that, assuming the term "conviction" to include the sentence, still the defendant was convicted of a crime so punish-

able, the liability to such punishment and not the punishment actually inflicted being the circumstance which controls the effect of the conviction in this respect.

3. PARDON.

Semble, that such forfeited privilege may be restored by a pardon to that effect, granted in pursuance of a statute expressly authorizing it.

Indictment for Voting Unlawfully, contrary to section 5511, Rev. St.

Rufus Mallory, for the United States.

H. Y. Thompson, George H. Durham, Sidney Dell, and W. W. Page, for the defendant.

R. S. Strahan also submitted a brief for the defendant.

DEADY, D. J. On December 17, 1880, the defendant was indicted, by the grand jury of the district court for the district of Oregon, for the violation of section 5511 of the Revised Statutes, committed by voting on June 7, 1880, for a representative in congress, at an election for such representative, in Madison precinct, county of Multnomah, state of Oregon, without having a lawful right to do so, for that, on June 28, 1871, he was indicted by the grand jury of the circuit court for the county of Marion, state of Oregon, of the crime of an assault with a dangerous weapon committed upon the person of Samuel A. Clarke, by shooting at him with a pistol, of which crime he was, on June 30th, thereafter, duly convicted by his plea of guilty to said indictment, and sentenced to pay a fine of \$200 and the cost of prosecution. The indictment was afterwards transferred to this court, and the defendant comes and demurs thereto, because: (1) It does not allege that the defendant voted as charged knowing he had no right to vote; and (2) upon the facts stated therein the defendant was not disqualified to vote as charged. The section (5511) under which the indictment is found declares that "if, at any election for representative or delegates in congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living or dead, or fictitious, or votes more than once at the same election for any candidate for the same office, or votes at a place where he may not be lawfully entitled to vote, or votes without having a lawful right to vote,

* * * he shall be punished by a fine of not more than \$500, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

The defendant, in support of the first ground of his demurrer, contends that the word "knowingly" is understood and implied, in each clause of this sentence, so that it must be construed as if it read, "knowingly personates and votes, or attempts to vote, etc.; or knowingly votes more than once, etc.; or knowingly votes at a place, etc.; or knowingly votes without having a lawful right to vote." And I have no doubt that such is the true construction of it. In *U. S. v. Anthony*, 11 Blatch. 200, which was an indictment upon the same statute for the same offence, it appears to have been so construed as a matter of course. The court, in speaking of the section under consideration, saying that the "act makes it an offence for any person knowingly to vote for such representative (a representative in congress) without having a lawful right to vote." And, as this case was well contested on the part of the defendant and turned solely upon the question of her knowledge of her want of right, this reading of the statute must have passed without contention, as being too plain for argument. In that case the defendant was qualified to vote, except for her sex; the law of the state (New York) being that none but males should vote. The defendant voted, claiming that under the fourteenth amendment to the constitution of the United States she was entitled to, notwithstanding she was a female. It was held, *Hunt, J.*, that as the defendant knew all the facts, and was presumed to know the law, her belief that she had a right to vote, when she had none, was no defence to the indictment, and therefore the court directed the jury to find the defendant guilty, which was done. The belief in such case may affect the sentence, but not the verdict. Whar. Cr. L. § 1835.

But the true reading of the statute being that the defendant's knowledge of the want of right to vote is an essential part of the crime, it should be expressly alleged in the indictment. Bish. Stat. Cr. § 827 *et seq.*; Whar. Cr. P. & P. § 164. The demurrer upon this point is sustained. But as another

grand jury may correct the indictment in this particular, or the defendant may be prosecuted by information, (section 1022 Rev. St.; *U. S. v. Block*, 4 Sawy. 211,) it is necessary, for the purpose of determining whether he ought to be held to answer further, to pass upon the second cause of demurrer. The solution of the question made upon this cause of demurrer lies within a small compass, and depends primarily upon the signification of the term "conviction" and the phrase "is punishable," as used in section 3 of art. 2 of the constitution of the state. The article is devoted to the subject of "Suffrage and Elections." The first section only declares, in a somewhat oracular manner, without practical definition or limitation, "All electors shall be free and equal." The second one confers the right to vote upon all persons who are entitled under any circumstances to exercise that privilege within this State; and the third limits the second, by declaring who shall not be entitled to such privilege, and also by what means the privilege conferred by said section 2 may be lost. It reads: "No idiot or insane person shall be entitled to the privilege of an elector; and the privilege of an elector shall be forfeited, by a conviction of any crime which is punishable by imprisonment in the penitentiary." The argument in support of the demurrer is to the effect that "conviction" of a crime takes place by the operation or effect of the sentence or judgment of the court determining and imposing the punishment therefor, and that as the defendant was only sentenced to pay a fine of \$200, he was therefore not convicted in the state court of a crime punishable by imprisonment in the penitentiary.

The authority cited and mainly relied upon to support this argument is *People v. Cornell*, 16 Cal. 187. The case is briefly and obscurely reported. It contains a short opinion by *Cope* and *Baldwin*, JJ., each,—*Field*, J., dissenting,—and relates to an appeal taken by a defendant from a judgment upon his plea of guilty. The authority of the case will be better understood by the following statement of it: The defendant was indicted for an assault with intent to commit murder, and pleaded guilty to an assault with a deadly weapon with intent to commit bodily injury, and was sentenced to

pay a fine of \$1,200, or be imprisoned in the county jail. The crime of which the defendant was convicted by his plea of guilty was punishable by imprisonment in the penitentiary, or by fine, or both; and by the law of the state any crime "punishable by death or imprisonment in a state prison" was a felony. Hittell's Laws, §§ 1452, 1592. By the constitution of the state, article 6, § 4, (Hittell's Laws, 35,) it was provided that the supreme court of the state should have appellate jurisdiction "in all criminal cases amounting to a felony."

Counsel for the state moved to dismiss the appeal, and the motion turned upon the decision of the question, whether the defendant's right to an appeal depended upon the nature of the crime charged in the indictment or confessed by his plea of guilty, or the punishment imposed upon him by the sentence of the court. The court held that the defendant having been sentenced as for a misdemeanor, an appeal would not lie from such judgment, because its appellate jurisdiction was limited to a "case amounting to felony." The court considered the case on the appeal, as one of misdemeanor, and therefore not within its appellate jurisdiction.

It is true that in the opinions of the judges the terms "conviction" and "judgment" are used indiscriminately, and the punishment inflicted is spoken of as determining the grade of the offence. But these expressions must be taken and considered with reference to the question before the court, which was whether a judgment as for a misdemeanor was a case of felony within the meaning of that clause in the constitution giving it appellate jurisdiction "in all criminal cases amounting to felony;" and the answer was in the negative, because, so far as the defendant was concerned, the right to an appeal depended upon the nature of the result as to him, and not the charge.

In the same way section 22 of the judiciary act, (1 St. 84; Rev. St. § 691,) giving the supreme court appellate jurisdiction over the judgments of the circuit courts in actions where "the matter in dispute" exceeds in value a certain sum, has been construed so that, upon the appeal of the defendant,

the value of the matter in dispute is measured by the amount of the judgment against him, while in the case of the plaintiff it is measured by the amount of the claim or charge. *Gordon v. Ogden*, 3 Pet. 33; *Knapp v. Banks*, 2 How. 73; *Ryan v. Bendley*, 1 Wall. 66; *Walker v. U. S.* 4 Wall. 163.

In *People v. War*, 20 Cal. 117, the question of the right of appeal in criminal cases came up again, and the court held (p. 120) that the statute definition of a felony—a public offence punishable by death or imprisonment in a state prison—included any offence which may be or is liable to such punishment; and that although the offence charged in an indictment may, in the discretion of the court, be punished simply by a fine, still it is a felony, and an appeal will lie by the people from a judgment sustaining a demurrer thereto. In noticing *People v. Cornell*, the court said the jurisdiction of the appeal was denied in that case upon the ground that “the nature and extent of the punishment fixed the right of the appeal” by the defendant.

In *People v. Apgar*, 35 Cal. 389, the defendant was indicted for an assault amounting to a felony, and convicted and sentenced for a simple assault. He appealed upon the ground that the character of the offence charged gave jurisdiction, but the appeal was dismissed upon the ground that he was acquitted of the felony and only convicted of a misdemeanor, and that therefore the case on appeal did not amount to a felony; and in referring to *People v. Cornell*, the court said it was held therein that the judgment determined the character of the case for the purpose of an appeal. The effect of the decision, then, in *People v. Cornell*, as I understand it, and as interpreted in both the cases of *War* and *Apgars* goes no further than that, unless the judgment in a criminal case imposed the punishment prescribed for a felony, the defendant cannot have the benefit of an appeal from it. But the question in this case is not whether the defendant has been convicted of a felony or misdemeanor, but whether he has been “convicted” of a crime “which is punishable by imprisonment in the penitentiary.” And the fact that a subsequent statute (Or. Cr. Code, § 3) has declared a crime “which is or

may be punishable by imprisonment in the penitentiary" to be a felony, does not have any bearing upon the case, unless it is to show that in the legislative mind the liability to such punishment fixes the grade of the offence and not the punishment actually inflicted.

In the argument for the defendant it has been assumed that "conviction" of a crime includes and is the result of the judgment or sentence of the court imposing the punishment prescribed therefor. But this is altogether a mistake. The term conviction, as its composition (*convinco*, *convictio*) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are, (1) by the plea of guilty, and (2) by the verdict of a jury.

Speaking of the difference between conviction and attain, Lord Coke says: "The difference between a man attainted and convicted is that a man is said convict before he hath judgment; as if a man be convict by confession, verdict, or recreancy." To the same effect is the definition in Blount's Law Dic. anno 1670, *verbum*, "convict."

Blackstone (4 Black. 362) says: "If the jury find him [the defendant] guilty, he is then said to be convicted of the crime whereof he stands indicted, which conviction may accrue two ways: either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country." Again he says: "After trial and conviction the judgment of the court usually follows." Id. 364. "We are now to consider the next stage of criminal prosecution after trial and conviction are past, * * * which is that of judgment," (Id. 375;) and "the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, * * * is a good plea in bar to an indictment." Id. 336.

Bishop, Statutory Crimes, § 348, says: "The word conviction ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said there has been a conviction, or one is convict, the meaning usually is not

that sentence has been pronounced, but only that the verdict has been returned. So a plea of guilty by the defendant constitutes a conviction of him."

Mr. Justice Story, in *U. S. v. Gibert*, 2 Sum. 40, while considering the maxim, "No man is to be brought into jeopardy of his life more than once for the same offence," said: "Conviction does not mean the judgment-passed upon the verdict;" and in the same case held that a plea of *autrefois convict*—a former conviction—will be sustained by a confession or verdict, even when there has been no judgment; citing 2 Hawk. P. C. c. 36, §§ 1, 10.

In *People v. Goldestin*, 32 Cal. 432, it was held that a plea of guilty upon which no judgment was given was nevertheless a conviction, and would therefore sustain a plea of former conviction to an indictment for the same offence. And the very statute under which the defendant was indicted uses the term in the same sense. It provides that any person, "upon conviction" of the crime therein defined, shall be punished as the court, within certain limits, may thereafter direct or adjudge by its sentence or judgment.

But, while this is the primary and usual meaning of the term "conviction," it is possible that it may be used in such a connection and under such circumstances as to have a secondary or unusual meaning, which would include the final judgment of the court. Bish. St. Cr. § 348; Whar. Cr. P. & P. § 935. Yet in *Stevens v. People*, 1 Hill, 261, it was held sufficient, in an indictment for a second larceny, to allege a prior conviction of the defendant, without averring that there was any judgment or sentence pronounced against him; but the contrary appears to have been held in *Smith v. Com.* 14 S. & R. 69, cited in Whar. Cr. P. & P. *supra*.

But there is nothing in the subject or the language of the clause of the constitution under consideration to indicate that the term "conviction" is used therein in any other than the ordinary sense. Of course, it is used there and elsewhere with the understanding that the conviction was not afterwards set aside or annulled by the court. And this is probably the point of the ruling cited from 14 S. & R. *supra*, that

the indictment, in alleging a prior conviction of the defendant, should allege a judgment on the verdict, not as constituting the conviction, but as conclusive evidence that it had not been set aside and was still in force. It follows, then, that the defendant, having pleaded guilty to an indictment charging him with an assault with a dangerous weapon, he was thereby convicted of such crime—proven guilty thereof. It only remains to consider whether this crime was punishable by imprisonment in the penitentiary or not. As has been stated, the punishment prescribed by the statute defining the offence is either a fine, imprisonment in the jail or in the penitentiary, in the discretion of the court. For the defendant it is contended that it was not punishable in the penitentiary, simply because it was not actually so punished, and section 764 of the Or. Cr. Code is relied upon as in some way supporting this position. Now, this section is simply declaratory of the pre-existing power of the court, and only requires it to determine the punishment applicable to a particular case, when that is left by the statute undetermined between certain limits or kinds. But it does not authorize the court to impose a punishment in any case which the law has not otherwise prescribed for the commission of the offence. Under the Code a crime is punishable—may be punished—by any punishment which the court is authorized to impose. It is punished by the punishment actually imposed, but it is punishable by any punishment that the law authorizes the court to impose. The phrase “is punishable” cannot be construed to mean more or less than “may be punished,” or “liable to be punished.”

In *People v. Van Steenberg*, 1 Park. C. R. 39, it was held that a crime which, in the discretion of the court, might be punished by a fine or imprisonment in the jail or penitentiary, was a felony within the statute definition thereof, to-wit, “an offence for which the offender, on conviction, shall be liable by law to be punished by death or imprisonment in the state prison.”

In *People v. Park*, 41 N. Y. 21, it was held that a person sentenced upon a conviction of a burglary, punishable gener-

ally by imprisonment in the penitentiary, was sentenced upon a conviction for felony within the meaning of the above definition, although, being under 16 years of age, he was, in pursuance of a special statute, sentenced to a house of refuge for juvenile delinquents instead of the penitentiary, and therefore that he was within the purview of the statute prohibiting persons from testifying as witnesses who had been "sentenced upon a conviction for felony." To the same effect is *Andrew v. Dieterich*, 14 Wend. 34; *Peabody v. Fenton*, 3 Barb. Ch. 462; *Fassett v. Smith*, 23 N. Y. 255.

Indeed, the proposition that a crime which may be punished by imprisonment in the penitentiary—a crime which is liable to such punishment—is made punishable thereby, is so self-evident that it hardly admits of argument.

The conviction of the defendant of an assault with a dangerous weapon was had by and upon his plea of guilty to the indictment charging him therewith. Thenceforth he stood convicted of a crime punishable by imprisonment in the penitentiary, and the liability to such punishment and not the punishment actually inflicted is the circumstance which controls the effect of the conviction in this respect. And the subsequent action of the court in giving judgment upon such conviction could not change the nature or effect thereof.

By virtue of section 3 of art. 2 of the constitution, as a consequence of this conviction, the defendant then and thereby forfeited the privilege of an elector, and thereafter had no lawful right to vote at any election in Oregon.

And even if it were conceded that the term "conviction" is used in the constitution in the sense of or so as to include the sentence of the court, still the conclusion would be the same. It would nevertheless be true that the defendant was convicted of and sentenced for a crime which was then punishable by law by imprisonment in the penitentiary. The fact that he was otherwise punished for it is entirely immaterial, because the forfeiture of his privilege as an elector did not depend upon the kind or measure of punishment actually inflicted, but the kind that might have been—the kind that

the defendant was liable to, and the court was authorized to impose.

So much for the legal aspect of the case. A word as to the moral one.

Throughout the argument for the defendant the court has been pressed with the suggestion and assumption that this prosecution is in some way an injustice to him, and that it is a great hardship for an elector to forfeit his privilege for the conviction of a crime which was only punished by the imposition of a comparatively small fine. In answer to the suggestion of injustice, it is sufficient to say that the prosecution is lawful. It is conducted by the attorney of the United States, upon the authority of a grand jury of more than 16 electors and tax payers, impartially selected and drawn from the body of the district, for the alleged violation of one of its most important laws—the law to preserve the purity and integrity of the election of representatives in congress. Neither is there any hardship in the case that can enter into the present consideration of it.

For reasons of public policy, the constitution of the state conferred the privilege of an elector on the defendant, during good behavior, and for like reasons declared it forfeited—withdrawn—upon his conviction of a crime of such character as presumptively proved him no longer fit for its exercise. Nor is this presumption affected by the fact that the court before which the defendant was tried saw proper, in the exercise of that discretion confided to it, to impose a comparatively slight punishment upon him. Under the constitution the conviction of a crime, for which the offender is liable to imprisonment in the penitentiary, works a forfeiture of the privilege of an elector, irrespective of the kind or measure of punishment which the judge, under the circumstances,—personal, social, political, or otherwise,—may see proper to impose as a punishment for it.

The law gave and the law had taken away—subject, it may be, to the operation of a pardon expressly restoring the privilege, and granted in pursuance of an act of the legislature authorizing it.

The demurrer to the indictment is sustained on the first ground; but, as it also appears that the defendant voted as charged in the indictment without having a lawful right to do so, the case is continued to await the action of another grand jury, or for prosecution by information, as the district attorney shall determine.

WALD, Assignee, etc., v. WEHL, Assignee, etc.

(Circuit Court, S. D. New York. December 10, 1881.)

1. BANKRUPTCY—JURISDICTION.

A voluntary petition in bankruptcy, signed and verified by the agent of the debtor, will be sufficient to sustain the jurisdiction of the bankruptcy court in a collateral proceeding.

2. SAME—VOID ASSIGNMENT—ASSIGNEE IN BANKRUPTCY.

An assignment for the benefit of creditors, made within four months of the filing of a voluntary petition in bankruptcy, is voidable at the suit of the assignee in bankruptcy.

In re Beisenthal, 14 Blatchf. 146.

3. SAME—EXPENSES PRIOR TO ASSIGNMENT IN BANKRUPTCY.

In such case the assignee for the benefit of creditors should be allowed, upon an accounting, for all proper expenses and services under the assignment, prior to the bringing of the suit to avoid the assignment.—[Ed.]

Suit by an assignee in bankruptcy to set aside a voluntary assignment for the benefit of creditors.

Henry H. Anderson, for plaintiff.

Alexander Blumenstiel, for defendant.

BLATCHFORD, C. J. This suit is brought by an assignee in bankruptcy, appointed by the district court of the United States for the southern district of Ohio, against a voluntary assignee of the bankrupts, to set aside a voluntary assignment made by them. The bankruptcy petition was voluntary. It purports, on its face, to be "the petition of Albert Netter and Gabriel Netter, partners as Netter & Co." It sets forth "that the said Albert Netter and Gabriel Netter, copartners," etc. It states that schedule A, annexed, "and verified by

their oaths," is a statement "of all the debts of said copartnership," etc.; that schedule B, annexed, "verified by their oaths," is an "inventory of all the estate of the said copartnership;" that "said Albert Netter further states" that schedule C, annexed, "verified by his oath," contains a "statement of all his individual debts," and that schedule D, annexed, "verified by his oath," contains an "inventory of all his individual estate;" that "said Gabriel Netter, by Albert Netter, his agent, further states" that schedule E, annexed, "verified by his oath," contains a "statement of all his individual debts," and that schedule F, annexed, "verified by his oath," contains an "inventory of all his individual estate." The petition prays that the petitioners may be adjudged to be bankrupts. It is signed thus: "Albert Netter; Gabriel Netter, by Albert Netter, his agent; Netter & Co.,—Petitioners." The oath to the petition reads thus: "We, Albert Netter, and Gabriel Netter, by his agent Albert Netter, the petitioning debtors," etc. It is signed thus: "Albert Netter; Albert Netter, agent for Gabriel Netter,—Petitioners." Schedule A, annexed, appears to embody, in addition to the debts of Netter & Co., the individual debts of Albert Netter, marked C, and the individual debts of Gabriel Netter, marked E. Schedule B, annexed, appears to embody, in addition to the estate of Netter & Co., the personal estate of Albert Netter and the personal estate of Gabriel Netter, though the marks D and F seem to be wanting. Schedule B states that all the property named in it, as well that of Netter & Co. as the personal estate of Albert Netter and the personal estate of Gabriel Netter, is assigned to Julius Wehl. There are two oaths to schedule A. One is signed "Albert Netter." It states that he "did declare the said schedule to be a statement of all his debts," etc. The other is signed, "Albert Netter, agent for Gabriel Netter." It states that "Albert Netter, the duly-authorized agent and attorney in fact of Gabriel Netter, the person mentioned in and who subscribed to the foregoing petition and schedules marked A, respectively, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts," etc. There

are two oaths to schedule B. One is signed "Albert Netter." It states that he "did declare the said schedule to be a statement of all his estate, both real and personal." The other is signed "Gabriel Netter, by Albert Netter, his agent." It states that "Albert Netter, the duly authorized agent and attorney in fact of Gabriel Netter, the person mentioned in and who subscribed to the foregoing petition and schedules marked B, respectively, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal." The petition was filed April 23, 1878. The order of reference to the register, made that day, recites that "Albert Netter and Gabriel Netter * * has * * filed * * a petition for adjudication in bankruptcy against himself." The adjudication made April 29, 1878, by the register, finds "that the said Albert Netter and Gabriel Netter, as partners and individuals, have become bankrupts," and declares and adjudges them bankrupts accordingly. The appointment of the plaintiff as assignee is entitled, "In the matter of Albert Netter and Gabriel Netter, partners as Netter & Co., and as individuals, bankrupts," and he is appointed "assignee of the estate and effects of the above-named bankrupts." The assignment by the register to the plaintiff recites that the plaintiff "has been duly appointed assignee of the estate of Albert Netter and Gabriel Netter, partners as Netter & Co., and also as individuals," and assigns to him "all the estate, real and personal, of the said Albert Netter and Gabriel Netter, as partners and as individuals."

The defendant takes the objections that the petition and schedules are not signed or verified by Gabriel Netter; that it does not appear that Albert Netter had authority to sign the petition as attorney for Gabriel Netter; that no reason appears why Gabriel Netter did not sign the petition himself; that the oath to the petition and the oaths to the schedules do not contain any allegation by Albert Netter that he is the agent of Gabriel Netter, but merely describe him as such agent; that such description in the oaths is merely the averment of the officer before whom the oaths were taken,

and is not the averment of Albert Netter, and is made by way of recital only; that the forms of the oaths to the schedules are such as to say that the schedules set forth only the assets and liabilities of Albert Netter; that there is no oath that any assets or liabilities of Gabriel Netter are given; that Albert Netter swears that the schedules are statements, the one of his debts and the other of his estate, and then signs as agent for Gabriel Netter; and that therefore the district court obtained no jurisdiction over the person or property of Gabriel Netter, and no power to adjudicate him a bankrupt, or to transfer his property to the plaintiff. In support of these objections, it is urged that section 5017 of the Revised Statutes provides that the schedule of debts, and the inventory of the estate, must be verified by the oath of the petitioner; that section 5014, in requiring a debtor to apply by petition, requires that he shall sign the petition, or in person verify the schedule and inventory, so as to make it appear that he sanctions and authorizes the proceeding; that when the statute intends that a matter in bankruptcy shall be conducted by an agent, it is so prescribed; that section 12 of the Act of June 22, 1874, (18 U. S. St. at Large, 180,) provides for the signing and verifying of a petition in involuntary bankruptcy by an agent of a creditor, if the creditor does not reside in the district in which the petition is to be filed; that section 5078 provides for the verifying of a proof of debt by an agent under specified circumstances and in a specified form; that section 5122 provides for the voluntary petition of a corporation by an officer of it, duly authorized as an agent to do so in a specified way; that these provisions, in the absence of a provision for a voluntary petition by an individual, to be signed or sworn to by an agent, show an intention that such a proceeding should not be lawful; that, at least, express authority for the signing or verification by the agent should be shown; that in partnership cases, in bankruptcy, where one partner refused to join in a petition made by the other partner, he is brought in by notice, through an order to show cause served upon him, and no jurisdiction over him or his estate can otherwise be acquired; that Albert Netter's

position as partner conferred on him no agency for Gabriel Netter to put Gabriel into bankruptcy, except by following the course prescribed by general order No. 18 in bankruptcy; that the adjudication can be assailed collaterally in this suit because it appears on the face of the bankruptcy papers that there was no jurisdiction over the person of Gabriel Netter, and no jurisdiction over the copartnership or its property; and that the proceedings were at most valid only in respect to Albert Netter and his individual debts and assets, and the plaintiff can at most have relief in respect only to the individual property of Albert which went into the hands of the defendant.

For the plaintiff it is contended that the only jurisdictional requisites prescribed by sections 5014, 5015, and 5016 are residence, owing debts, and application by a petition addressed and setting forth as specified, and having the prescribed schedule and inventory annexed; that there is nothing in the statute which requires the petition to be signed or verified by the debtor personally; that section 5014 provides that if the person specified shall apply by a petition addressed and setting forth as specified, and shall annex to his petition a schedule and inventory in compliance with sections 5015 and 5016, "the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt;" and that the provision of section 5017, that "the schedule and inventory must be verified by the oath of the petitioner," and that of section 5018, requiring an oath of allegiance by a petitioner who is a citizen, are not essentials of the jurisdiction, because they are not found in any one of the three sections preceding section 5017.

There is nothing in the bankruptcy statute which requires that a voluntary petition shall be signed or verified by a debtor in person in order to give the court jurisdiction of the proceeding. Many of the considerations discussed by Judge Woodruff, in *In re Raynor*, (11 Blatchf. 43,) in reference to whether a petition in involuntary bankruptcy must be signed and verified by the creditor in person, apply to the present question. This is not a direct proceeding to

review the adjudication. It is a collateral suit. Gabriel Netter does not raise the question. It does not appear that he ever raised it in the bankruptcy court by asking to have the proceeding as to him vacated, on the ground that Albert Netter was not his agent. There can be no doubt that the bankruptcy court acquired jurisdiction of the case in respect to Gabriel Netter, and so in respect to the firm, although the petition was signed and verified on his behalf, and for him, and not by him personally. The prescription in various other places in the statute as to how an agent shall do certain acts in bankruptcy matters, cannot be construed into a provision that the signing and verifying of a petition in voluntary bankruptcy by an agent of the debtor, where the petition purports to be the petition of the debtor, shall not be regarded as a sufficient signing and verifying by the debtor, so as to require it to be held, in a collateral action, that the court did not acquire jurisdiction of the proceeding.

Whether there was satisfactory evidence before the bankruptcy court that Albert Netter was the agent of Gabriel Netter, and authorized to present and sign the petition in the name and behalf of Gabriel Netter, and to verify it and the schedule and inventory on the behalf of Gabriel Netter, and whether the averments of the petition and the oaths as to the agency and authority, and the forms of the oaths in other respects, were adequate and sufficient to satisfy that court of the existence of the agency and authority, and of the formal sufficiency of the petition and oaths, were questions exclusively for the consideration of the bankruptcy court, and cannot be reviewed in this suit. There were in the petition, and in the signatures to it, and in the oaths, and in the signatures to them, such averments and statements as to the fact that Albert Netter was the agent of and the attorney in fact for Gabriel Netter, as authorized the bankruptcy court to exercise its judgment as to whether it was satisfied of the existence of such agency and attorneyship, and to determine that it was so satisfied, if it was so satisfied. Being so authorized and having so determined, it must be held to have had jurisdiction of the case; and its

determination is not reviewable in this suit. *Michaelis v. Post*, 21 Wall. 398; *Sloan v. Lewis*, 22 Wall. 150; *Lamp Chimney Co. v. Brass & Copper Co.* 91 U. S. 656.

It follows that the bankruptcy proceedings extended to both of the partners of the firm, and that the partnership assets passed to the plaintiff by the assignment in bankruptcy.

The assignment made by the bankrupts to the defendant was a voluntary assignment of all their property, individual and copartnership, for the benefit of their creditors, without preferences. It sets forth their insolvency, and the answer in this suit admits that the defendant knew the assignors to be insolvent at the time the assignment was made. The assignment was made within four months before the petition in bankruptcy was filed. The case is one under section 5129. Such an assignment is voidable at the suit of the assignee in bankruptcy, and he is entitled to recover in a case like the present. *In re Beisenthal*, 14 Blatchf. 146.

The plaintiff is entitled to a decree in the usual form, setting aside the assignment as invalid as against him, and providing for an accounting by the defendant in respect to the property he received thereunder. As the assignment is avoided not for any fraud in fact, but only as voidable under the bankruptcy statute, and as it would have been valid if this suit had not been brought, the defendant must be allowed on the accounting for all proper expenses and services under the assignment, prior to the bringing of this suit, according to the principles set forth in *Platt v. Archer*, 13 Blatchf. 351, and in *McDonald v. Moore*, 8 Ben. 579.

In re EKINGS, Bankrupt.

(District Court, D. New Jersey. February 23, 1881.)

1. BANKRUPTCY—PROOFS OF DEBT—DISCHARGE—ACT OF JUNE 22, 1874, § 9.

Proofs of debt, filed with the register after the application of the bankrupt for his discharge, should be counted, under the provisions of section 9 of the amendment of June 22, 1874, in ascertaining the assent of one-third in number and one-fourth in value of the bankrupt's creditors.

2. SAME—PECUNIARY CONSIDERATION—DISCHARGE.

A promise by a bankrupt to pay his creditor "all he ever owed him when he got able," upon condition that he would assent to his discharge, constitutes a pecuniary consideration or obligation sufficient to defeat the right of the bankrupt to a discharge.

3. CONTRACT—CONSIDERATION—MORAL OBLIGATION.

A moral obligation to pay a debt constitutes a sufficient consideration to support a parol promise at common law.—[Ed.]

Specifications against Discharge.

Thomas D. Hoxsey, for bankrupt.

H. A. Williams, for creditors.

NIXON, D. J. Various specifications are filed against the discharge of the bankrupt, but when explained they all seem to revolve around the methods resorted to, and the expedients adopted by his attorney to procure the requisite one-fourth of his creditors in number, and one-third in value, to consent to the discharge. The application for the discharge was filed June 17, 1879, and the order upon the creditors to show cause why the same should not be granted was returnable on the twenty-second of July following. On the day before the return of the same, to-wit, on the twenty-first of July, four new proofs of claim were made and filed with the register: (1) One by John C. G. Robertson, who had already put in a proof for upwards of \$1,200, and who now proved an additional claim for \$300, consisting of two promissory notes and a check, which had been procured without consideration from some faithless creditors, who had not deemed them worth the expense of proving; (2) one by Joseph Parker, the father-in-law of the bankrupt, and who paid one Thomas Beverage \$25

for a claim of \$207, and proved for the whole amount; (3) one by James M. Smylie, who had before made proof of a claim for \$277, and who had afterwards surrendered to the assignee a mortgage which he held against some real estate of the bankrupt to secure the payment of a bond for \$1,100, and had proved the bond as an unsecured debt; (4) one by Francis Ekings, the brother of the bankrupt, who proved a claim of about \$600, which did not appear in the schedules of the bankrupt, and which had been barred by the statute of limitations for a long number of years.

It was conceded upon the argument that all these creditors made their proofs before the hearing, on the application for discharge, for the sole purpose of aiding the bankrupt in obtaining his discharge by filing consents thereto.

Two questions are presented—*First*, whether proofs of debt, filed with the register after the application of the bankrupt for his discharge, are to be counted, under the provisions of section 9 of the amendment of June 22, 1874, in ascertaining the assent of one-third in number of creditors and one-fourth in value; *second*, whether the testimony shows that the bankrupt has violated the eighth clause of section 5110 of the Revised Statutes, which prohibits a discharge “if the bankrupt, or any person in his behalf, has procured the assent of any creditor, or influenced the action of any creditor, at any stage of the proceedings, by any pecuniary consideration or obligation.”

1. The original section of the bankrupt act, (section 5112 of the Revised Statutes,) to which the ninth section of the amendment of June 22, 1874, was a supplement, required that the assent in writing of a majority in number and value of the creditors should be filed in the case at or before the time of hearing of the application for discharge. All proofs of debt, therefore, that were made before the time of hearing, could be used as foundations for assents filed at the hearing. The supplement is less exacting, and was passed to facilitate the opportunities for a discharge. It does not require the assent to be in writing, nor to be filed anywhere, nor at any specified time. It simply reduces the required number

of assenting creditors from a majority to one-fourth in number and one-third in value. My attention has not been called to any provisions of the bankrupt act which require proofs of debt to be made within any particular time while the bankruptcy proceedings are pending. The only penalty upon creditors for neglecting to prove is that they can have no vote in the choice of an assignee, nor participate in any dividend declared before the proof is put in, nor act in the allowance or disallowance of claims of other parties, nor in the question of the discharge of the bankrupt. Under these circumstances, I am of the opinion that there is nothing in the amendment of June 22, 1874, either in its expressions or omissions to express, which should be interpreted as taking away the right of creditors to file proofs of claims and assent to the discharge at any time up to the day of hearing.

2. The next question is whether the bankrupt, or any person in his behalf, has influenced the action of any of the creditors named in the specifications by any pecuniary consideration or obligation. They have, doubtless, been greatly influenced in their conduct by the bankrupt and his attorney. They have been persuaded to surrender securities, and to purchase debts and claims against the estate which otherwise would not have been proved, in order that they might sign the consent to the bankrupt's discharge. They have been induced to perform these acts—one, at least, by family connections and relationships, and others by their feelings of friendship for the bankrupt. When done from such motives only they are allowable. The law does not find fault with the bankrupt for asking his friends and relatives to aid him in obtaining his discharge, nor does it prohibit them, on such solicitation, from proving honest debts against the estate, when there is no expectation of a dividend, for the purpose of enabling them to sign the necessary consent thereto. To make such acts unlawful they must be the result of *pecuniary consideration or obligation*.

What evidence is there that any of the creditors have been thus influenced? The nearest to it that I can discover is the case of Robertson, one of the creditors, who had proved a

debt for \$1,255.40 before the application for discharge was made, and who afterwards, obtaining notes and checks of the bankrupt for about \$300, without paying any consideration therefor, proved them on the day before the hearing, and filed a new consent for the discharge. According to his testimony in chief he was moved to do this upon the distinct verbal promise of the bankrupt (1) that he would pay him all that he ever owed him when he got able, and (2) because the bankrupt, in consideration of the creditor aiding him to procure his discharge, acknowledged the existence of a hitherto unacknowledged debt for borrowed money, and promised that he would see it right. It is true that the witness, on his cross-examination by the bankrupt's attorney, gave a broad, naked denial that any such promises were made, but he does not explain why he had asserted these facts on his principal examination, and all the circumstances of the transaction indicate that his first statements were true. He was a personal friend of the bankrupt, and I can find stronger reasons for his denial of the promise after he was led to understand that it would operate injuriously on the question of discharge, than I can find for his original testimony, if it had no existence in fact. Whether such inducements, held out by the bankrupt to the creditor, constitute a *pecuniary consideration or obligation*, depend upon the question whether the creditor can enforce the payment of his claims against the bankrupt under such promises.

I will dismiss from consideration the promise secondly above stated, where the bankrupt acknowledged the debt for borrowed money, and said "he would see it right." I think such an expression is too vague to revive a debt which has been discharged. The supreme court, in *Allen v. Ferguson*, 18 Wall. 3, held that the promise by which a discharged debt is revived must be clear and distinct. In that case, after the debtor had applied for the benefit of the bankrupt act, and while the proceedings were still pending, he wrote to one of his creditors: "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made out of hired labor." And in a postscript he added: "All will be

right between me and my just creditors." The court, speaking by Mr. Justice Hunt, said that the debt, having been discharged by the discharge of the debtor, was not renewed by such expressions; that the law required an absolute or conditional promise to pay; but, in either case, it must be unequivocal.

The other promise of the bankrupt is unequivocal, although conditional. The creditor was asked: *Question 270.* "Did he (the bankrupt) say how he would manifest his gratitude for it?" (i. e., for proving the debt and giving the consent.) *Answer.* "By paying me all he ever owed me when he got able." Such a conditional promise has always been held to be binding when proof is made of the ability of the bankrupt to pay. *Freeman v. Fenton*, Cow. 544; *Besford v. Sanders*, 2 H. Black. 116; *Fleming v. Hayne*, 1 Star. 370; *Sconton v. Eislord*, 7 John. 36; *Maxim v. Morse*, 8 Mass. 127; *Corliss v. Sheppard*, 28 Me. 550; *Kingston v. Wharton*, 2 S. & R. 208; James on Bank. 146.

Kingston v. Wharton, *supra*, was quite like the case under consideration. The plaintiff in the suit was an indorser upon the note of the bankrupt. On the twenty-ninth of December, 1800, the debtor wrote to him asking him to take up the note at maturity, and declaring, "The moment I am able to relieve you, I will." The note fell due February 13, 1801, was protested and paid by the plaintiff. A commission of bankruptcy was issued against the defendant March 16, 1801, under which he was declared a bankrupt, and on the twenty-sixth of May, following, he obtained his discharge. The action was founded upon a promise to pay when the debtor should be able. The letter was treated by the court as a promise made by the debtor to induce the creditor not to oppose his discharge, and such promise was held to be good. The debt, notwithstanding the discharge, remained due in conscience. The moral obligation to pay still existed, and was a sufficient consideration to support the promise. Stress was laid upon the fact that in England it required an act of parliament (5 Geo. II, c. 30, § 11,) to avoid a promise by the bankrupt to pay a debt which otherwise would have been discharged

in consideration of the creditors consenting to a discharge. And it may be added that the same provision was re-enacted in the English bankruptcy act of 1861, (24 & 25 Vict. c. 124, § 166;) but I do not find it in the English act of 1869, and hence infer that such a promise would now be reckoned valid and binding there, except so far as it might be affected by the statute of 6 Geo. IV. c. 16, which requires the bankrupt's promise to pay a debt dischargeable in bankruptcy proceedings to be in writing, and signed by him or by some one by him lawfully authorized. A similar law was enacted in New Jersey a few years since requiring every promise of the bankrupt to pay any debt or demand, from which he had been released by bankruptcy, to be put in writing, and signed by the party to be charged therewith. But it does not seem to apply to the present case, as it is limited in terms to promises *made after the discharge*. Rev. St. N. J., "Frauds and Perjuries," § 8. The promise here was made pending the bankruptcy proceedings, and before the discharge was granted.

The case under consideration, therefore, must be decided, according to the principle of the common law, which declares that the moral obligation to pay the debt is a sufficient consideration to support a parol promise. *May v. Sperry*, 6 Cush. 240.

Under the evidence and the law, the bankrupt is not entitled to his discharge, and the same is refused.

SCHREIBER & SONS, who sue as well for the United States as for themselves, v. CHARLES SHARPLESS & SONS.*

(District Court, E. D. Pennsylvania. February 7, 1881.)

1. ACTION FOR PENALTY—PRINCIPAL NOT LIABLE FOR ACTS OF AGENT.

Where suit is brought to recover a penalty imposed by statute, the doctrines of principal and agent, which prevail in civil transactions, are inapplicable, and the principal is not responsible for acts of his agent done without his knowledge.

* Reported by Frank P. Richard, Esq., of the Philadelphia bar.

2. COPYRIGHT—COPYING AND PUBLISHING COPYRIGHTED PHOTOGRAPH—SECTION 4965, REV. ST.—SUIT AGAINST FIRM FOR STATUTORY PENALTY—FIRM NOT LIABLE FOR ACTS OF AGENT DONE WITHOUT ITS KNOWLEDGE—RIGHT OF RECOVERY AGAINST ONE PARTNER ALONE.

A superintendent, employed by a dry goods firm, caused, without the knowledge of the firm, lithographic copies to be made of a copyrighted photograph, and sent them to the dyer employed by the firm, who attached them as labels to certain goods. These goods were then sent to the store of the firm, where they were sold. Prior to such sale a piece of the goods, with the label attached, together with the copyrighted photograph, was shown to one of the partners, who expressed his approval. None of the other partners ever had any knowledge of the transaction. In a *qui tam* action by the proprietor of the copyrighted photograph against the firm, to recover the statutory penalty imposed by section 4965, Rev. St., *held*, that the copying and publishing (if the term "publish" in the statute had reference to pictures) had been completed prior to the time when the goods reached defendants' store. *Held, further*, that the statute being penal, defendants were not responsible for the acts of their agent done without their knowledge.

Quere, whether, if plaintiff had so elected at the trial, the suit could have been regarded as against the several members of the firm individually, and a recovery sustained against the one alone who was shown the copies.

This was a *qui tam* action brought under section 4965, Rev. St.,* by Schreiber & Sons, who sued, as well for the United States as for themselves, against Charles L. Sharpless, Henry W. Sharpless, and Charles W. Sharpless, "trading as Sharp-

*This section reads as follows: "If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale—one-half thereof to the proprietor and the other half to the use of the United States."

less & Sons," to recover the statutory penalty for the copying, publishing, and selling by defendants of a photograph copyrighted by plaintiffs. The *narr.* contained four counts, respectively, charging defendants with copying and printing, publishing, exposing to sale, and selling the said photograph. Defendants pleaded "not guilty." On the trial the evidence disclosed the following facts: Plaintiffs, who were photographers, had made and copyrighted a photograph of the elephant "Hebe" and her baby "Americus." Notice of the copyright was printed on each copy of the photograph. The defendants were dry goods merchants in Philadelphia. The superintendent of their domestic department (Mr. Thornton) desired a new label for certain goods. Seeing one of plaintiffs' photographs he bought it, took it to a lithographer, and, without the consent of plaintiffs, caused a lithographic copy to be made and 15,000 copies thereof to be printed for labels. Five thousand of these copies were sent to the defendants' dyer and the remainder were sent directly to the defendants' store. The dyer attached these labels to 2,800 pieces of goods, which he sent to defendants' store, where they were exposed to sale and about 200 pieces sold. About 200 circulars, also, with the lithographic copy upon them, were distributed gratuitously. The defendants did not personally know anything about the matter until the labelled goods arrived at their store, when Mr. Thornton took a piece of the goods with the label on it, together with the photograph containing the notice of copyright, to Mr. Charles L. Sharpless, and exhibited them to him. He expressed his approval, and the goods were afterwards sold and the circulars distributed, as already stated. None of the other members of the firm knew anything about the matter. The court charged the jury that the defendants were not liable for the act of their agent done without their knowledge; that if the word "publish" was applicable to a picture, these copies were published by sending them to the dyer, and his use of them before Charles L. Sharpless had any knowledge of their existence; and that the evidence did not warrant a recovery, and their verdict should, therefore, be for defendants. The verdict was v.6,no.2—12

for defendants. Plaintiffs obtained a rule for a new trial. McKennan, C. J., was present at the argument of the rule.

H. P. Brown, Asst. Dist. Att'y, and *John K. Valentine*, Dist. Att'y, for the United States.

F. Carroll Brewster, for Schreiber & Sons.

E. Hunn, Jr., for defendants.

BUTLER, D. J. At the trial, the court, after referring to the fact that suit is against the firm of Charles Sharpless & Sons, charged that the claim of the plaintiffs is twofold,—*First*, for copying the picture, and *second*, for publishing the copies. That as respects the first, the evidence shows the copying to have been done by the firm's employe, Mr. Thornton, without its assent or knowledge, and that it was not, therefore, responsible for his act; that the suit being brought to recover a penalty, the doctrines of principal and agent, which prevail in civil transactions, are inapplicable. That as respects the claim for publishing, if it be admitted that the term "publish," as employed in the statute, has reference to pictures, there is no evidence that the defendants published the copies procured by Mr. Thornton; that, as the evidence shows, a number of the copies were taken to the store by Mr. Thornton, and others sent to the dyers, where they were affixed to goods, which were subsequently taken to the defendants' store; that Charles Sharpless first saw the copies when the goods arrived, and was then informed of Mr. Thornton's acts in procuring them; that a part of the goods were subsequently sold, with the labels attached; that the publication of the copies had been made by Mr. Thornton and the dyer, before the attention of Mr. Sharpless was called to the subject; and that the other members of the firm never had any knowledge respecting it. The jury was, therefore, instructed that the evidence did not warrant a recovery, and to render a verdict for the defendants.

The only question presented on the trial, and the only question now presented, is, can the defendants be held responsible, under the statute, for what was done by its agent or agents, in pursuance of their employment, without its knowledge? On the trial I believed it could not; and after hearing the

plaintiffs' counsel on this motion for a new trial, I believe so still. The case of *Stockwell v. U. S.* 13 Wallace, 548, draws a distinction between remedial, or compensatory statutes, and penal statutes. That the statute here involved is penal, is not open to doubt.

If the suit might be regarded as against the several members of the firm individually, and a recovery be sustained against Charles Sharpless alone, for publishing, a question might possibly arise whether the case should have gone to the jury, as upon a suit against him only. No such claim having been made, however, at the trial, this aspect of the case was not considered. As the record stands, I incline to believe the claim, if made, must have been denied.

The rule, therefore, is discharged.

MCKENNAN C. J. concurred.

ADAMS and others v. BRIDGEWATER IRON Co. and others.

(Circuit Court, D. Massachusetts. February 26, 1881.)

1. EQUITY PRACTICE—EXCEPTION TO ANSWER.

An answer is not subject to exception because it contains a substantive defence not responsive to a bill in equity.

2. SAME—PLEADING.

"There is no regular authorized mode of pleading, like a demurrer, to test the legal validity of part of an answer; but possibly, on motion, some order might be taken to dispose of part of a case in the first instance, if it should be found that great delay and expense might thereby be avoided."—[Ed.]

In Equity. Exceptions to Answer.

Geo. W. Estabrook, for complainants.

D. Hall Rice, for defendants.

LOWELL, C. J. The defendant corporation, by its answer to the bill, makes all the defences usual in a patent suit, and adds that it has received from the plaintiff Adams a release, under seal, of all actions for infringement, if it has committed any. A copy of the release is set out, and the defend-

ants pray to have the same benefit of these facts as if they had been pleaded in bar. The plaintiffs except to the answer on the ground that this release, if given precisely as it is averred to have been given, is insufficient in law to bar the plaintiffs' suit.

A substantive defence, not responsive to the plaintiffs' inquiry in his bill, is not the subject of exception. That form of objection applies only to an insufficient discovery, or to scandal and impertinence.

The plaintiffs intended by their exceptions to procure a hearing upon the validity of this defence as if it were a plea and they had set it down. But it is not a plea. It is part of the answer, and is merely one of several defences. By the thirty-ninth rule in equity a defendant may make a plea part of his answer, and, if he does so, he shall not be compellable to answer more, or otherwise, than if he had filed a regular plea. The defendants have taken no advantage of this rule; they have answered the whole bill fully; and their request to have the same advantage as if they had pleaded the release, has no meaning. As it stands, it is, as I have said, one substantive defence not used by way of plea at all, but by way of alternative answer. It stands precisely like the defence of the statute of limitations, which they also rely on in another part of their answer, and which they might have used by way of plea or demurrer.

Whether the court may not have power to hear such a defence before requiring the whole case to be gone into, is not now the question. There is no regular authorized mode of pleading, like a demurrer, to test the legal validity of part of an answer; but possibly, on motion, some order might be taken to dispose of part of a case in the first instance, if it should be found that great delay and expense might thereby be avoided. I do not decide that point.

Exceptions overruled.

STRAW SEWING MACHINE CO. v. EAMES.

(Circuit Court, S. D. New York. December 23, 1880.)

1. RE-ISSUE No. 7,985.

Re-issue No. 7,985, for an "improvement in sewing machines," is *not void* as to the first three claims for want of novelty.

2. SAME.

There is no departure in such re-issue from the original, which in any manner affects the validity of the third claim of the re-issue.

3. SAME—INFRINGEMENT.

The first three claims of such re-issue *held to be infringed*, although there were certain formal structural differences in the infringing machine.—[Ed.]

In Equity.

S. J. Gordon, for plaintiff.

Strawbridge & Taylor, for defendant.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent granted to the plaintiff, December 11, 1877, (No. 7,985,) for an "improvement in sewing machines," the original patent, 38,807, having been granted to Charles F. Bosworth, June 9, 1863, and re-issued to the plaintiff, June 1, 1875. The specification of No. 7,985 reads as follows, including what is inside and what is outside of brackets, and omitting what is in italics: "Be it known that I, C. F. Bosworth, of the [town of Milford] *city of New Haven*, in the state of Connecticut, have invented certain new and useful improvements [in] *to be used in combination with sewing machines*, whereby such machines are better adapted to the sewing of braid or plaiting, or other narrow strips of material, the improvements being chiefly applicable to stitching together braids of straw braid, chip, palm-leaf, etc., in the manufacture of hats, caps, and bonnets. These improvements are fully, clearly, and exactly hereinafter described, in connection with the drawings which make part of the description. In the drawings, figure 1 is a front elevation of a sewing machine with my improvements attached. Fig. 2 is a view in perspective of *the improvements and* certain parts of the sewing machine. Figs. 3, 4, 5, and 6 are sketches exhibiting on a

large scale the roller over which a piece of braid is to be fed, and illustrating some of the varieties of stitch that may be made by the use of my improvements. Braids of straw, etc., are usually sewed together by hand. The stitch commonly employed is a long one, and of such a character that little or none of the thread appears upon what is usually termed the right side; and *sewing machines without my improvements are practically useless for the purpose, as all of them that I know of sew a seam showing upon the right side a thread reaching from needle-puncture to needle-puncture, the whole length of the seam.* My improvements are applicable, under certain changes of form, to most, *if not all*, of the sewing machines now in use, and making different varieties of stitch, the precise method of conforming the loops of upper thread, passed through the goods by an eye-pointed piercing needle, being immaterial so far as the sewing of straw is concerned; but I have experimented chiefly upon shuttle machines, and reduced my invention to practice on such a machine, and have, in the drawings, shown my improvements as applied to, and acting in combination with, a Singer shuttle machine with a transverse shuttle. These and other sewing machines are so well known in the market, and to manufacturers and workmen, that any detailed description of the construction or operation thereof is deemed unnecessary. [My] *The nature of my invention consists [of certain combinations of mechanical devices which are set forth in the claims at the close of this specification.] first, in the combination of a roller, or its equivalent, with the needle of a sewing machine and the feeding apparatus thereof, when the three are arranged and act in combination with each other, substantially as specified; and, also, in the combination, with a sewing-machine needle and a roller or bending surface, of a contrivance for guiding the needle itself at some points above the material being sewed, thus forcing the needle to pierce a proper distance from the roller, as hereinafter set forth. And my invention also consists in combining with a sewing-machine needle and a roller, or its equivalent, for making a turn or bend in braid to be sewed, a vibrating needle-guide, or proper apparatus for vibrating a needle, the operation being to cause the needle to pierce braid nearer to, or*

further from, the surface of a roller. In the drawings, the fly-wheel of the machine is shown at *a'*, the needle-bar at *a*, the needle at *g*, the take-up apparatus at *b'*, and the table or surface upon which the goods to be sewed are supported at *c*; and the machine has a feed apparatus of any known kind which is capable of advancing braid, etc., to be stitched, between a presser-foot, such as *b*, and a table, and also a shuttle carrying a bobbin of second or under thread, *colored blue in the drawings*, so moved and operated as to confine loops of needle thread passed through braid by the piercing needle. The distinguishing peculiarity of the stitch made by the use of my improvements is this, namely: that the piercing-needle [with] and the thread it carries enters a piece of braid from the side that is nearest to the other piece of braid to which it is to be sewed, and leaves that first piece of braid on the same side at which it entered. This is the leading idea on which my invention is based, and the improvements carry this idea into practice. There is, therefore, attached to the presser-foot bar, or to some other convenient part of the machine, a frame, *c'*, which carries a roller, *e*, whose axis is at right angles, or nearly so, with the line of progression of the [work] cloth. The upper of the two pieces of braid to be stitched together, *k'*, passes over this roller, then under it, and thence over the other piece of braid, *k*, and the roller holds one piece down upon the other. In order to keep the upper braid in position sidewise, there is an adjustable gauge, *d*, which may be attached to the frame, *c'*, [and operates upon one edge of the braid, and I have represented another gauge, *l*, which operates at the opposite edge of the braid,] and, in order to make the upper braid apply itself closely to the roller, there is supported in the frame, or attached to the presser-foot, another bar or roller, *e'*, which rests upon the surface of the braid. I prefer to attach this bar to a slide, *e''*, claspings the presser-foot rod, and adjustable thereon by a set-screw, so that the bar or roller may be set to adapt itself to different thicknesses of braid. In order to guide the under piece of braid, there may be attached to the table a guide, *j*. In sewing with the contrivance as thus far described, a single piece of braid, or the braid on the edge

of a number of pieces already stitched together, is to be introduced under the presser-foot, (see fig. 2,) and another piece of braid is to be passed under the bar, *e'*, and thence over and under roller *e*. If *e* be properly set with reference to the needle [the latter] it will pass into the upper braid, out of it again on the same side that it entered, and thence through the lower one, (see fig. 3,) and its thread may appear on the upper surface, as in fig. 6, at *w*; or, if the braid be thick or the roller further from the needle, the thread may not appear at all on the upper surface, but assume a position as shown at *w*, fig. 4[.]; and when [When] the loop [of needle-thread] has been secured below the lower braid, and the needle has risen out of both pieces, then the feed will advance both braids, and in so doing will carry the upper one over the bonding roller, so that it may be pierced at a different spot on the next descent of the needle, the feed and roller, by their combined action, presenting the upper braid properly. The operation would not, however, be as certain as desirable, owing to the springing of the needle [by the glancing of its point from the bent surface of the braid.] I therefore *set the needle so that it will not pierce the upper piece of braid at all, unless it is bent or sprung over towards the roller on its descent*, and apply to the presser-foot, or other convenient support, a guide, such as *f*, which *springs the needle over towards the roller when the needle point enters the guide*. A bent piece of metal, with a conical hole in it, or a simple surface standing nearly upright, but inclining away from the needle at its upper edge, answers the purpose [of such guide] *well*. The guide [*f*] shown in the drawings has two surfaces meeting at an angle or apex through which the needle passes. By means of this addition the needle is forced to pierce in the desired line, and the operation of sewing is rendered certain. The loops of needle-thread passed through the lower braid are to be confined by a shuttle-thread, as shown in the drawings, or by a looped thread, as in the Grover & Baker stitch machines, or by a loop of the upper thread, as in crochet machines, and the stitch is drawn tight when it has passed, or just as it is passing away, from the roller. As the seam is stronger when the needle-

thread shows on the upper surface, and as it is desirable that it should show only at long intervals, further apart than can be conveniently fed or sewed in a sewing machine in the interval between one stitch and another, I have devised a contrivance by the use of which some of the stitches will be made in the lower braid only. In order to do this the needle is set [so that it will not pierce the upper piece of braid at all, unless the needle is bent or sprung over towards the roller on its descent, and the needle-guide, *f*,] *as before, and the guide* is mounted upon a spring arm which tends to press it towards the roller, *e*, while an adjustable stop, *r*, (*see fig. 1*), regulates the distance to which [the needle-guide] it shall approach the roller. Upon the presser-foot bar there is mounted, so that it can turn, an [irregular] *irregularly* polygonal plate, *p*, having secured to it a ratchet-wheel, *n*, provided with a detaining pawl, if necessary, as at *o*, and with an actuating pawl, such as *i*, pivoted to a crooked bar, *h*, which is pivoted on the presser-foot. A pin, *s*, is attached to the needle-bar, and the crooked bar and pin are so arranged relatively to each other that each stroke of the bar shall reciprocate the pawl, and consequently turn the irregular plate which bears against the spring-support of the [needle] guide. By shaping this plate properly the needle can be caused to pierce the upper piece of braid at every other stitch, or every second, third, or fourth, or greater number of stitches, as desired, so that seams may be sewed like those in *figs. 5* [and] *6*; or, by proper shape and adjustment of the parts, seams may be sewed where the upper thread shows at intervals on the upper surface of the upper braid, and at other times merely catches into the upper braid; or seams may be sewed having some stitches showing in the upper surface of the upper braid, others catching into it and not showing, and others still which do not catch the upper braid at all. In sewing such seams the needle springs away from the roller, and is drawn towards it at the time and to the extent desired by the spring guide, the latter being governed by the [irregular] *irregularly*-shaped plate. The whole contrivance, therefore, is one for vibrating the needle to and fro in the direction of the line of the seam, and any

contrivance that will so cause the needle to vibrate as to pierce or not pierce the upper braid, as desired, may be substituted for the apparatus especially described. Where a vibrating needle, as thus described, is used, the feed apparatus feeds both the upper braid and the material to which it is to be stitched, as before stated, and presents both braids in such manner, by the aid of the roller, that the needle may puncture either both braids or one braid only, depending upon the line in which the needle descends. The roller, *e*, may revolve or be stationary. I prefer that it should revolve, and the bar, *e'*, and guide, *d*, may be dispensed with, and the braid be kept in position by the fingers; the gist of the invention being to hold one piece of braid in reference to the braid or other material on to which it is to be stitched, and, in reference to the needle, in such manner that the needle shall enter and leave the upper braid on the same side thereof, and shall afterwards pierce the lower braid or piece of stuff to which the upper braid is to be sewn. As before stated, any proper feeding apparatus may be used, but I prefer that commonly known as the four-motion roughened-surface feed, or else the wheel-feed. As the braids to be sewed together are sometimes of considerable thickness, and as one lies on top of the other, the uppermost braid will be held slightly above the table or platform of the machine. An ordinary feeding-bar will, therefore, act most effectually, if not entirely, on the lowermost braid; but as the sewing, owing to the great length of the stitches, will be better if the feeding device acts equally on both braids, I intend sometimes to use independent feeds, one adjusted for each braid, and, when using a four-motion feed, to split the feeding-bar at or about the line of junction of the braids, thus making two feeding-bars, and to apply a set-screw, or some equivalent device, so that the two bars may have their relative heights or levels adjustable, the one to the other, thus causing that bar which acts upon the uppermost braid to work at the highest level, so that this braid may be as effectively fed as the lower one. In sewing hat-brims and other covered work, one braid, that nearest the center of the hat, must, of necessity, move through a less distance than the other, and in order to make the feed adapt

itself to both, so as not to wrinkle either, and in order also to regulate the curvature of the seam, I intend to make one feed move, at each stitch, through a greater distance than the other does. This object may be attained most easily by advancing two feeding-bars by the same cam, and by regulating their retreating motions by separate stops, one or both of which may be adjustable, and acting like the adjustable feed-regulators well known to constructors of sewing machines. I do not claim a vibrating needle simply, nor a guide for a needle, nor rollers, or bars, or guides for cloth or braid, by themselves, or out of the combinations in which I employ them, so as to produce the desired effect." Omitting from the foregoing specification the parts enclosed in brackets, and taking in what is in italics, produces the original specification. The claims of the re-issue are as follows: "(1) The combination, substantially as before set forth, of an eye-pointed needle, a roller or its equivalent, over which the braid to be sewed is bent, a feed apparatus or mechanism, a gauge for the upper braid, and a guide for the lower braid; (2) the combination, substantially as before set forth, of an eye-pointed needle, a roller or its equivalent, over which the braid to be sewed is bent, a feed apparatus, two gauges for the upper braid, (one at each of its edges,) and a guide for the lower braid; (3) the combination, substantially as before set forth, of an eye-pointed needle, a roller or its equivalent, around which braid can be bent, and a needle-guide, the three being arranged and acting in combination substantially as specified; (4) the combination, substantially as before set forth, of a vibrating eye-pointed needle, substantially as specified, with a roller, around which braid can be bent or turned, and feed apparatus; the mode of operation of the combination being substantially such as set forth." The claims of the original patent were as follows: "(1) The combination of a sewing-machine needle with a roller or its equivalent, and with a feed apparatus or mechanism, when the needle and roller are so arranged relatively to each other that braid can be sewed by a needle piercing and leaving the braid or other material on the same side thereof; the combination being substantially such as described.

(2) In combination, a sewing-machine needle, a roller or its equivalent around which braid can be bent, and a needle-guide, the three being arranged and acting in combination substantially as specified; a vibrating sewing-machine needle, or a sewing-machine needle caused to vibrate by proper mechanism substantially as specified, in combination with a roller around which braid can be bent or turned, and any appropriate feed apparatus; the mode of operation of the combination being substantially such as set forth."

It is contended, for the plaintiff, that the defendant's machine infringes the first three claims of No. 7,985. In No. 7,985 the fresh piece of braid which is to be sewed to the partially-completed work passes to it at its upper side, while in the defendant's machine the fresh piece of braid passes to the needle at the under side of the partially-completed work. In No. 7,985 the needle is vertical, at right angles to the table, while in the defendant's machine the needle is horizontal and parallel with the table. In No. 7,985 the stock of the roller over which the braid is bent has its plane parallel with the table, while the corresponding device over which the braid is bent in the defendant's machine has the plane of its stock perpendicular to the table. Nevertheless, it is claimed that the defendant's machine has in combination all the elements of the first three claims of No. 7,985.

It is apparent, from the original specification, that Bosworth had two separate arrangements in connection with a needle-guide. He had a guide to guide the needle above the material to be sewed at every stroke of the needle, the needle being set so that it would not, but for the needle-guide, pierce the upper piece of braid at all, and the needle-guide being so arranged as to deflect, or bend, or spring the needle over, in its descent, towards the roller, and cause it to pierce the braid. The description and the drawings show that the needle could not pierce the braid at all unless pressed over by the needle-guide. The second arrangement in connection with the needle-guide was the polygonal plate and its connections, to vibrate the needle-guide and the needle laterally, and cause the needle to pierce nearer to or further from the roller; the needle being,

however, set as before, so as not to pierce at all unless sprung over by the needle-guide. In the specification of No. 7,985 the feature of the setting of the needle so as not to pierce at all unless sprung over by the needle-guide, and the necessity of the springing of the needle over by the needle-guide at every stroke, is omitted as an existing feature where the needle does not vibrate laterally, and is retained as a feature only when the needle vibrates laterally. In the original specification it was a necessary feature both when the needle did not vibrate laterally and when it did. The defendant's machine has no lateral vibration of the needle, nor any corresponding vibrating movement of the needle-guide. Nor, in the defendant's machine, is the needle set so as not to pierce unless sprung over by a needle-guide, nor is there a needle-guide which springs the needle over towards the bending device when the needle-point enters the guide. The specification of No. 7,985 is altered so as, when no vibration of the needle is employed, to make the operation of the needle-guide an operation merely to prevent the glancing of the needle-point from the bent surface of the braid. Yet the needle-guide in Bosworth's original specification had an operation to prevent the glancing of the needle-point from the bent surface of the braid, although it had an additional operation to spring the needle over so as to pierce the braid. In the defendant's machine there is an arrangement which operates as a needle-guide, so far as to prevent the glancing of the needle-point from the bent surface of the braid. In the original specification of Bosworth the feature of the needle-guide as preventing this glancing is set forth. That specification, when it speaks of "the springing of the needle," means the springing of the needle by the glancing of its point from the bent surface of the braid,—a springing which must ensue if not counteracted by the interposition of a bearing surface to resist. The apparatus described, to spring the needle over as it descends, necessarily involves the existence of the bearing surface to resist any tendency of the needle to glance off. The bearing surface to spring the needle over is the bearing surface to resist any

tendency of the needle to spring back. Hence, there is no departure in the re-issue from the original, which in any manner affects the validity of the third claim of the re-issue, and the needle-guide of that claim must properly be construed as a needle-guide which prevents the glancing of the needle from the braid, although it may not also spring the needle over towards the roller, and although it may not vibrate. It follows, also, from the foregoing observations, that the needle mentioned in the first three claims is not required to be a vibrating needle. The vibrating needle is a special construction, and is a feature of claim 4. The needle of the first three claims is a non-vibrating needle. The second gauge for the upper braid in the Bosworth machine is shown in the drawings of the original specification, and it was proper to describe it in the re-issue.

The defendant's machine has an eye-pointed needle. It has a device, over which the braid is bent, which is an equivalent for the Bosworth roller; the lower end of it, over which the braid to be sewed is bent, being rounded, and the axis of such lower end being substantially at right angles to the line of movement of the work. The point of the needle, passing in a straight line through the bend of the material, comes out on the same side of the material as that at which it entered. The feed apparatus is an equivalent for that of Bosworth. The adjustable gauge for the fresh braid is substantially the same as Bosworth's gauge for the upper braid. The guide for the partially-completed work is substantially the same as Bosworth's guide for the lower braid. The additional gauge for the other edge of the fresh braid is like Bosworth's additional gauge for the other edge of the upper braid. The needle-guide and its operation have already been considered. It follows, from these considerations, that the defendant's machine infringes the first three claims of No. 7,985. In so holding, I have not overlooked the changes of form before alluded to, nor the facts that the defendant's machine sews a hat from the center of the crown outwardly to the brim, with the fabric lying right side up on the bed-plate, while the

Bosworth machine sews from the brim inwardly; that in Bosworth only one braid is bent, so that the needle passes through three thicknesses of material, while in the defendant's machine both braids are bent, so that the needle passes through four thicknesses of material; and that there are other formal structural differences. But these differences are aside from the vital operating combinations claimed in the first three claims of No. 7,985.

It is urged with great earnestness, on the part of the defendant, that in the original specification the only guide shown or described is a vibrating guide, so constructed as to be forced to continuously vibrate whenever the machine is operated. This is an error. The original specification describes the guide, first, as a fixed guide, added to force the needle to pierce in the desired line, and to be used when every stitch is to pierce the upper braid. The second claim of the original embodies such a guide, fixed and non-vibrating. Then the original specification goes on to describe a contrivance, the polygonal plate, to be added so as to make some of the stitches in the lower braid only. This is the vibrating needle-guide.

The novelty of the first three claims of No. 7,985 is not successfully attacked. Bosworth's bending device and his two gauges for the fresh braid were new devices. Therefore, the three claims are valid, as the bending device is an element in each. Besides that, neither the Rodgers, nor the Morey, nor the David patent contains any provision to prevent the glancing of the needle from a rounded surface.

There is nothing in the Sherwood patent, or in any testimony as to what Sherwood did, to invalidate either of the first three claims of No. 7,985, or to show that what the defendant has used in infringement of those claims existed before Bosworth's invention. The reasons for this conclusion are well and fully set forth in the testimony of Mr. E. S. Renwick, the plaintiff's expert, and it is unnecessary here to state them.

The evidence shows that Bosworth was the first person who made a machine containing devices which operated successfully to make the sewing of straw braid in the making of hats

and like articles otherwise than by hand a practical art, and the re-issued patent No. 7,985 is valid.

There must be a decree for the plaintiff, for an account of profits and an ascertainment of damages, with costs.

WORTH v. STEAM-TUG WM. MURTAGH.

(District Court, E. D. New York. February 14, 1881.)

1. TOW—WRECKED CANAL-BOAT—SUBSEQUENT LIABILITY OF TUG.

Where a canal-boat in tow of a tug sunk in a channel-way, and was abandoned by the tug, and two days after another vessel ran on the sunken wreck, which was not buoyed, and sustained damage, for which she brought suit against the tug, *held*, that the tug was not liable for such damage, it appearing that the canal-boat had her master on board and in charge at the time of sinking; that the tug did all she could to save her, and was justified in leaving her when she did.

In Admiralty.

F. A. Wilcox, for libellant.

E. D. McCarthy, for claimant.

BENEDICT, D. J. This is a proceeding *in rem* to enforce a lien against the tug William Murtagh for the amount of the damage caused to the sloop Bolivar for running upon a sunken canal-boat named the Anna Maria, which at the time lay under water near the mouth of Gowanus creek, in the harbor of New York. The evidence shows that the Anna Maria, on the sixth day of April, had been taken in tow by the William Murtagh to be towed from Elizabethport to New York with several other boats. While prosecuting that voyage this boat was found to be sinking. Effort was at once made by the tug to get her into a place of safety, but before she could be got upon the flats she sunk in the channel-way. After the Anna Maria had gone to the bottom the tug proceeded on her voyage with the other boats. On the eighth day of April the sloop Bolivar, while navigating the channel in question, ignorant of the presence of the canal-boat in the channel,—

the same being under water, without a buoy or other means of indicating her presence,—ran upon the wreck and sustained damages, to recover which she brings this action against the tug which had the canal-boat in tow at the time she sank. The evidence shows that the canal-boat had a master on board and in command of her during the voyage described; that when the canal-boat went down the tug left and paid no further attention to her, and that she was afterwards raised by her owners. On the part of the libellant it is contended that the evidence also shows the canal-boat to have been unseaworthy at the time she was taken in tow by the tug; and it is insisted that it was a fault on the part of the tug to attempt to tow such a boat across the harbor of New York; that the sinking of the boat must be attributed to the fault of the tug in attempting to take an unseaworthy boat across the bay, and that consequently the tug became subject to an obligation to remove the wreck, or so buoy it as to notify other vessels navigating the channel of the existence of this hidden danger.

In disposing of this case I assume that the sinking of the boat arose from her unseaworthy condition; and I also assume—without intending so to decide on the present occasion—that it was negligence on the part of the tug to attempt to tow such a boat across the harbor of New York, and that such negligence was one cause of the boat's sinking. I consider the case as turning upon the question, whether, with these assumptions, the tug has been shown to have been under the obligation to remove the wreck, or so buoy it as to give notice of its presence. Upon this question my opinion is adverse to the libellant.

The evidence shows beyond dispute that the canal-boat went down in spite of all reasonable exertions on the part of the tug to get the canal-boat to a place where she could sink and be out of the channel; that after the canal-boat sunk the tug proceeded on her way with the remainder of the tow, without any objection on the part of the master of the canal-boat. The damage sued for occurred on the eighth of April, after all connection between the tug and the canal-boat had
v.6,no.2—13

ceased. At that time, as I conceive the law to be, the tug was under no obligation whatever in respect to the wreck. In *White v. Crisp*, 10 Ex. 312, it was held that in order to make out the existence of an obligation on the part of a defendant to maintain a buoy upon a wreck, it is not enough to show that the fault of the defendant caused the sinking, but it must also appear that at the time the damage arose the defendant was in possession and control of the wreck, and able to remove or to buoy it.

In this case, sometime prior to the damage in question, all connection between the tug and the canal-boat had been terminated, under circumstances justifying such action on the part of the tug. Because her connection had been so terminated under such circumstances, I am of the opinion that at the time of the damage to the Bolivar the tug was under no obligation to prevent the canal-boat from being a cause of damage to other vessels navigating the channel wherein she was sunk, and consequently is not liable for the injuries sustained by the Bolivar. It is said that if such be the rule an inducement is held out to tugs to abandon their tows at the earliest moment, in all cases of disaster, in order to escape further responsibility; but it is not seen that such a consequence will follow from a case like the present, where it is proved that the tug was justified in terminating her connection with the canal-boat, because every reasonable effort had been made on her part to get the canal-boat to a place of safety before she sunk, and no requirement was made by the master of the canal-boat for any further effort in his behalf. The tug, having done all that it was possible for her to do to aid the canal-boat in its distress, had the right to terminate her connection with the canal-boat, there being a master of the canal-boat there present; and, having so terminated her relation with the canal-boat under circumstances justifying such action, all obligation in regard thereto ceased and was at an end.

The libel must therefore be dismissed, and with costs.

THE STEAM-BOAT DELAWARE.

*(District Court, S. D. New York. January 19, 1881.)*I ADMIRALTY — COLLISION — FERRY-BOAT APPROACHING SLIP—TOW—
NEGLIGENCE—NINETEENTH RULE OF NAVIGATION—LIGHTS.

Where a steam-tug, with a tow on her starboard side, was moving slowly down the Hudson river on the Jersey side, a short distance above the Pavonia ferry, about 3 o'clock A. M., the night being clear and the weather fine, with lights indicating that she had a tow, and before reaching the ferry noticed the steam ferry-boat D., while on her trip from New York to Jersey City, heading diagonally across and up the river and across the stern of the tow, and not yet having reached that point in her course at which she turned in towards the ferry-slip, whereupon the tug blew one whistle to the ferry-boat to indicate that she would pass to the right of the D., across her bows, which signal the ferry-boat did not observe or respond to, but continued on her course at full speed, and turned towards the ferry slip as if to cross the bow of the tug, which was then closely approaching the mouth of the ferry slip, whereupon the tug, observing her movements, immediately reversed and backed at full speed, and when the ferry-boat was about 600 feet from the mouth of the slip she gave to the tug a signal of two whistles, which the tug did not reply to, but continued to back, and the ferry-boat, continuing on her course into the slip without slowing or backing for the tug, but slowing and backing to prevent her striking too violently against the ferry racks, and as she passed the tug came in collision with and injured the canal-boat in tow of the tug:

Held, that the D. was in fault in not noticing and responding to the signal of the tug, in not keeping a good lookout and observing that the tug was proceeding down the river, and in not keeping out of the way of the tug after she brought the tug and tow on her starboard hand.

Held, immaterial that the tug was at the time moving very slowly, her movement being such that it could have been observed from the ferry-boat, and her lights showing that she had a tow.

The Narragansett, 4 FED. REP. 244.

Held, also, immaterial that the tug and tow were moving down very near the ends of the piers.

Also held, that even if the tug was in fault, and if such fault contributed to the collision, the owner of the canal-boat could recover his full damages against the ferry-boat.

The Atlas, 93 U. S. 302.

In Admiralty.

W. R. Beebe, for libellant.

S. Hanford, for claimant.

CHOATE, D. J. This is a suit to recover damages sustained by the libellant's canal-boat, the H. B. Moore, resulting from a collision with the steam-boat Delaware, on the thirtieth day of July, 1879. The Delaware is a large side-wheel steam ferry-boat, of the Pavonia line, and was on her trip from New York to the Pavonia ferry, Jersey City, and the collision took place just off the mouth of the ferry slip, on the Jersey City side, a little after 3 o'clock in the morning. The weather was fine and clear, and lights could be plainly seen. The libellant's canal-boat and another canal-boat, the Gibbes, both loaded with wheat, were taken in tow by the steam-tug Mississquoui at the grain dock, or pier No. 8, which is about 800 feet to the northward of the ferry slip in Jersey City. Both the canal-boats were made fast on the starboard side of the tug. The tug having made the Gibbes fast along-side got a line on the H. B. Moore and hauled her out into the river, and there made her fast along-side the Gibbes. The Gibbes projected forward of the tug, and the H. B. Moore a little forward of the Gibbes. The tug backed out and up the river in getting the H. B. Moore along-side. The canal-boats were bound for the Cunard dock, on the Jersey side of the river, below the ferry, and before the tug got straightened down the river she had drifted a short distance down stream. The tide was ebb along the docks on the Jersey shore, but the current was very slight. After getting straightened down the tug started down the river.

The testimony on the part of the libellant is that after getting started down the river under two bells, and when they had attained a speed of two or three miles an hour, the pilot of the tug saw the ferry-boat coming across the river heading about for the tug—that is, to the northward of the ferry slip to which she was bound; that the tug gave her one whistle to indicate that she would pass to the right of the ferry-boat—that is, cross her bow before the ferry-boat entered her slip. The testimony on both sides is that as the tide was that morning, in her usual course from slip to slip, before the ferry-boat gets headed for her slip she does head further to the northward, pointing about north-west, and afterwards, and as she approaches her

slip, heads in directly for it, or about west. The testimony of her pilot and lookout was that she took such a course on this trip, and that they did not notice the lights of the tug at all till the ferry-boat got directly headed for the slip, and they say at a distance of about 600 feet outside of it. There is a great weight of testimony in support of the claim of the tug that before the ferry-boat reached this point the tug gave her a single whistle. The testimony on the part of the libellant is conflicting as to whether the Delaware answered the one whistle of the tug with a single whistle. The pilot and one of the deck hands of the tug testify that she did. Other witnesses on the part of the libellant testify that she did not, or at least that they heard no reply. The witnesses from the ferry-boat testify that she did not give the tug a single whistle. Upon the whole, I think the weight of the evidence is that she neither noticed the one whistle of the tug nor answered it, nor at the time the tug whistled had seen her lights, although they were plainly in sight and had moved slowly down from pier 8.

This is in substance the effect of the testimony of the pilot and lookout of the ferry-boat, and I think it extremely improbable that if she had answered the tug's signal with a single whistle she would, in direct violation of that signal, have immediately headed across the bow of the tug, and attempted to run into the slip ahead of her. The pilot and deck-hand of the tug must therefore be mistaken. A long time elapsed between the occurrence and the giving of their testimony, and their recollection may well have been at fault on this point, or they may have heard something at the time which they mistook for an answering whistle. Almost immediately after the tug gave her one whistle, her pilot observed that the ferry-boat was swinging to the west and heading for her slip, and still coming on at full speed. She was running at a speed of about 10 miles an hour. The pilot of the tug immediately rung to slow, stop, and back the tug, and she was backing at the time of the collision, and her headway by the land was nearly stopped. It was after the

ferry-boat got thus headed for her slip, and when she was, as her pilot and lookout say, about 600 feet outside of her slip, that she discovered the tug, whose headway by that time had been considerably checked, and the ferry-boat gave a signal of two whistles, indicating that she was going into her slip ahead of the tug. The pilot of the ferry-boat testifies that when he discovered her he thought she was not in motion. The tug made no response, but continued to back at full speed. It clearly was the duty of the ferry-boat, in this situation, to give way to the tug. She had the tug on her starboard hand, and their courses were crossing so as to involve risk of collision, (nineteenth rule for avoiding collisions.) It is no excuse for her to say that she took the tug to be standing still, and not in motion. It was a gross fault and negligence that she had not before seen her, and observed that she was coming down the river. Her two vertical lights indicated that she had a tow. It is immaterial that the tug was moving very slowly. *The Narragansett*, 4 FED. REP. 244. It was impossible for the tug, by backing, to keep clear of the course of the ferry-boat into the slip. The signal came too late, and she was already backing to avoid a collision. The ferry-boat having given the two whistles kept on at full speed for some distance without waiting for a response, and her pilot only discovered that the tug was in motion when she had got very close to the tug, and it was too late, perhaps, to avoid a collision. She did not in any respect alter her movements in approaching her slip in consequence of the tug being there. She slowed and backed before she got to the bridge, but it was because it was usual for her to do so, not to avert the impending collision. It is very clear that she was in fault in not giving way to the tug, having her on the starboard hand, in giving her a signal she could not comply with, and then without waiting for an answer in going ahead at full speed as if the tug would or could comply. A great deal of testimony has been taken as to the distance the tug was from the ends of the piers. It is wholly immaterial, except as affecting the credibility of witnesses, and of the

least possible importance in that respect since the judgment of witnesses as to distance on the water, especially at night, is notoriously untrustworthy.

From the circumstance that the libellant's canal-boat, when struck on the port bow by the guard of the ferry-boat forward of the wheel and torn from the tow, was carried into the slip against the center pin, I think it is very probable that she was running nearer the piers than the witnesses of the libellant testify. Whatever her distance from the pier, however, the ferry-boat had her lights in full view, and should have observed them and governed herself accordingly. If the tug was nearer to the piers than was prudent, it did not contribute to cause the collision, because she was in full view of the ferry-boat, and even if this had been a fault which contributed to cause the collision it would not relieve the ferry-boat from liability. *The Atlas*, 93 U. S. 302. The same is true of the stopping of the tug, if that was a fault which contributed to the collision. An attempt was made on the part of the libellant to show that the pilot of the ferry-boat, who, as such pilot, was examined on the trial, was not in fact at her wheel at the time of the collision. The evidence relied on was an alleged admission to that effect to another witness in conversation. I am satisfied that he must have been misunderstood by this witness, and that in fact he was at the wheel.

Decree for libellant, with costs and reference to compute damages.

THOMAS FAWCETT & SONS v. STEAM TOW-BOAT L. W. MORGAN.

(District Court, W. D. Pennsylvania. February 7, 1881.)

1. COLLISION—TOW-BOAT CHANNEL—BARGES AT ANCHOR—TOW IN MOTION.

Where barges were so moored as to encroach upon the tow-boat channel of the Ohio river, and be in the way of descending coal-tows, such tows being unwieldy and without sufficient steam-power to resist the force of the current, *held*, that the rule which requires a steamer in motion to steer clear of a vessel at anchor was not applicable to a descending tow-boat, whose tow struck the exposed barges, and that the tow-boat was not liable for damages, there being no want of proper effort on its part to avoid the collision.

2. SAME—BARGES ANCHORED IN CHANNEL—MODE OF NAVIGATING TOW.

Where there are two commonly-practiced and approved modes of navigating tow-boats with coal-tows past a certain point, parties who have there placed their barges so as to encroach upon the tow-boat channel, and be in the way of descending coal-tows, have no right to complain that a descending tow-boat did not pursue that one of the two modes which was the safer for the barges in their exposed situation, when those navigating the tow-boat did not know or have reason to suspect the barges were there until it was too late to change the mode of running the point.

3. SAME—VERDICT IN COMMON-LAW ACTION—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

The owners of the tow-boat brought a common-law action against the owners of the barges for damages sustained by the collision, alleging that it was caused by the defendants having negligently and unlawfully obstructed the channel, and there was a general verdict and a judgment thereon for the defendants. *Held*, that in a suit in admiralty by the owners of the barges against the tow-boat, the judgment in the action at law was not conclusive against the tow-boat, even to the extent of fixing upon the latter contributory negligence, it not appearing upon what ground the jury based their verdict, and one of the defences submitted to them being that the barges were in circumstances of distress from a previous disaster, and the emergency such that the owners were excusable in putting them where they did.

In Admiralty.

ACHESON, D. J. Late on the afternoon of November 25, 1874, the libellants' steam tow-boat Boaz, having in tow nine barges loaded with coal, left Pittsburgh bound for Louisville. The stage of water in the Ohio river was about eight and one-half feet—an ordinary coal-barge rise. Shortly after 6 o'clock

that evening the Boaz grounded her tow three miles below Pittsburgh, on a bar which lies opposite the foot of Brunot's island, and is distant therefrom about 350 feet. It was then dark, and the pilot of the Boaz had erroneously calculated her position in the stream in respect to the bar. Soon after the tow grounded, the steam-boat Mary Davidge, in descending the river, struck the grounded tow, crippling one of the barges and driving the Boaz and her tow further upon the bar. At the then stage of water the tow-boat channel hugs the foot of Brunot's island and runs near the south-western shore of the river at McKees's rocks, situate a few hundred feet below the island, the channel there making a short turn to the right below the bar. A strong current at that stage of water prevails at the foot of the island.

Within an hour after the grounding of the Boaz, two ascending steam-boats came to her relief and took from the bar four of the barges, which, by the direction of the captain of the Boaz, they placed at shore about 250 feet below the "knuckle" of McKee's rocks. The Boaz herself took the crippled barge and one other barge to the same shore. Three of the stranded barges remained fast on the bar. At first the six barges at shore lay two abreast, but during the night, and before the disaster hereafter to be mentioned, they were placed three abreast. They were each 24 feet in width, and the inside barge lay some distance out from the shore, but how far is not accurately shown. Some of the witnesses say 20 feet, others 60 feet. It is, however, in my judgment, clearly proved that these barges lay in the way of tow-boats going out on that rise, and in a position of peril both for the barges themselves and descending tows by reason of the extreme danger of the latter coming in collision with the barges.

There was a safe landing at Neville station, one mile below, to which the five uninjured barges might have been taken in about one hour's time, and a proper landing for the crippled barge on the side of the river opposite McKee's rocks. The assisting steam-boats would have taken the five barges to Neville station if requested. The captain and pilot of the Boaz, however, did not at first know the extent of the

injury to the crippled barge, and they expected to be able shortly to resume their voyage.

Soon after 4 o'clock next morning, and before daylight, the steam tow-boat L. W. Morgan left Pittsburgh, with a tow of eight barges loaded with coal, bound for Cincinnati. The tow was of the usual size for a boat like the Morgan, and was made up in the customary manner, to-wit: Six barges were in front of the tow-boat, lashed together in two tiers of three barges each, and on either side of the tow-boat was a barge extending back on the boat some 40 feet. The entire length of the tow from the front end of the forward barges to the stern of the steamboat was about 360 feet, and the extreme width was 72 feet. The barges were drawing about six feet of water, the ordinary draft. When the Morgan reached the head of Brunot's island the pilot at the wheel and the other pilot, who also was in the pilot-house, discovered the lights upon the Boaz and her barges. Both these pilots then supposed the lights to be those of an ascending boat; and this was a reasonable conjecture, for the bow of the Boaz was up stream, and she was then either in the act of moving from the lower end of the shore barges to a place below the bar, where the stranded barges lay, or she had just taken the latter position. No one on the descending tow had heard of the misfortune which befell the Boaz the evening before, and the pilots of the Morgan were entirely ignorant of the then condition of affairs at the foot of the island. When the lights were first seen the Morgan was about a mile up stream; but she had approached within about 400 yards of the foot of the island before her pilots discovered, or were able to discover, that there were barges aground on the bar at the right of the channel, and barges a short distance below to the left at shore. The Morgan's engines had already been reversed to check her headway, and she continued so to work them, putting on full steam-power. When she reached the foot of the island she backed her stern strong into the island and threw the head of her tow out to avoid the barges. But the best efforts of the Morgan failed, and the larboard side of her tow struck the outside of the libellants' upper outside barge near

its upper end. That barge was so damaged that it soon sunk. Another of the libellants' barges was very slightly injured. Their entire loss was \$2,044.56. By the collision the owners of the Morgan were also sufferers to the extent of \$1,600. Three of their barges were injured, of which two eventually sunk. The collision occurred shortly after 5 o'clock A. M.

The libellants allege that their loss was occasioned by the "negligent, careless, and unskilful manner in which the said steam-boat L. W. Morgan was navigated and handled;" and they seek a decree against the vessel. The libel does not specify wherein the alleged negligence, carelessness, and unskilfulness consisted; but the libellants insist that the proofs show that it was the duty of the Morgan to have so descended the river in the vicinity of Brunot's island, the bar, and McKee's rocks, as to pass out from McKee's rocks around the bar by "flanking," and not in the manner in which the boat was there run; and that by thus "flanking out" the collision with the libellants' barges would have been avoided. In no other particular has complaint been urged against the Morgan.

The expert witnesses speak of two well-known methods of navigating the river at and out from McKee's rocks by tow-boats with tows in charge, viz., by "flanking" and by "steering." Perhaps the witness Michaels most clearly explains these methods. He describes "steering out" thus: "When we get to the point [*i. e.*, lower end] of the island you back the stern of the steam-boat up to the land, throw her head away from the head of the shore, swing her out, and drive ahead." The other method he thus describes: "In flanking we commence away above; flank down the island, with the stern of your steam-boat towards the island, till you come down near enough—till you get through to the inside of the bar—and turn the stern of your steam-boat towards the bar and flank out." The tow-boat ordinarily draws less water than her tow, and this witness states that in flanking as above described the stern of the tow-boat overlays the bar. The evidence clearly establishes that tow-boats with such tows as that of the Morgan pass out from McKee's rocks in both the ways above

described,—sometimes by “flanking,” sometimes by “steering,”—and as often by the latter as the former method. There is no fixed rule as to running this place, and on each occasion the pilot exercises his best judgment as to the course he will adopt.

Some of the expert witnesses (but not all) say that flanking out from McKee's rocks is the safest course generally. Most of them, if not all, testify that it was the best and safest course for the libellants' barges, in view of their locality at shore, and the libellants insist that the Morgan is chargeable with negligence in not pursuing that course. But I cannot adopt this conclusion. To pronounce “steering out” from McKee's rocks to be negligence *per se* would be to condemn the common practice of some of the best of pilots on the river. Was, then, the Morgan censurable in undertaking that mode of navigation on the occasion in question? I think not. When she entered at the head of Brunot's island her pilots did not know, and had no reason to suspect, the state of things existing below. They were not bound to anticipate that they would find the libellants' barges projecting into the ordinary tow-boat channel, at that stage of water, at McKee's rocks; and when they discovered these barges it was too late to attempt to change the Morgan's stern from the island to the bar. Such a maneuver then—with a huge and unwieldy tow, in a five-mile current, before daylight, with stranded barges on the bar, whose precise location was not known—would have been extremely hazardous, if not inevitably fatal to both parties. To effect a landing at that time and place was impracticable, and the Morgan had not power to back up stream, or even to hold her tow against the current. She could not do otherwise than pursue her descending course. The most that could be done was to check the boat's headway by reversing the engines, and this was done. I am satisfied that, after the danger was perceived, all that was possible to avert the catastrophe was promptly done; and I am of opinion that, from first to last, the Morgan was blameless.

It however appears that the owners of the Morgan brought

suit against the present libellants in the court of common pleas No. 1, of Allegheny county, to recover damages sustained by them in consequence, as they alleged, of the libellants having negligently and unlawfully obstructed the tow-boat channel, in which suit there was a verdict for the defendants and a judgment in their favor, which was affirmed by the supreme court of Pennsylvania. And it is claimed that this judgment is conclusive against the owners of the Morgan to the extent of fixing upon them at least contributory negligence. But the verdict in that suit was a general one, and it does not appear upon what ground the jury based their finding. It was contended, on behalf of the defendants there, (the libellants here,) that they were justified in temporarily mooring their barges off McKee's rocks in their then circumstances of distress. That defence was submitted to the jury, as will appear from the following extract from the charge of the learned judge who tried the case: "But if you should think" (he instructed the jury) "that the weight of the evidence does not make out that the defendants, under all the circumstances, were negligent; that, intending to continue their voyage, they did what ordinarily prudent and skilful pilots would do under the circumstances,—you should find for the defendants." It is highly probable that the jury—taking a charitable view of the conduct of the defendants—found a verdict in their favor based upon the conclusion that in the emergency a reasonable necessity existed for placing their barges where they did. But, assuredly, there was no absolute necessity for so doing; and when the libellants chose to put their barges in a place of manifest danger,—in the way of unmanageable tows which they knew were coming out on that rise with pilots ignorant of the facts,—the libellants must be held to have taken the consequent risks of collisions. Obviously the case is not one for the application of the rule which requires a steamer to steer clear of a vessel at anchor. *The Petrel*, 18 Law Rep. (8 N. S.) 185. It may be added that it was most unfortunate that the barges were not suffered to remain as at first placed along the shore, two abreast;

for then, it is safe to say, the tow of the Morgan would have passed them without hurt.

Upon the whole case, I am of opinion that the libel should be dismissed, with costs. And now, February 7, 1881, upon consideration, it is ordered, adjudged, and decreed that the libel in this case be dismissed, and that the libellants pay the costs.

THE SCHOONER EDWIN POST.

(District Court, D. Delaware. March 1, 1881.)

1. ADMIRALTY—AMENDMENTS.

Amendments are allowable in admiralty, in the discretion of the court, at any time until the termination of the cause.

2. MARINER—WAGES—REV. ST. §§ 4546, 4547.

The proceedings by a mariner to recover his wages, under the provisions of sections 4546 and 4547, U. S. Rev. St., are cumulative in their character, and do not interfere with his rights to recover his wages by a proceeding according to the ancient course of admiralty, as the same existed before the passage of the act of 1790, upon which the above-named sections are founded.

3. SAME—SAME—SAME.

At most, the effect of the sections above referred to is to restrain a proceeding *in rem* against the vessel before the expiration of 10 days after the wages are due.

In Admiralty. Libel for Wages.

Charles B. Lore, for libellants.

L. C. Vandegrift and E. G. Bradford, Jr., for respondent.

BRADFORD, D. J. The libellants in this cause filed their libel against said vessel, etc., for wages, alleging their shipment for six months by the master on April 26, 1880, at the wages of \$18 a month, and the expiration of their term of service under said contract upon October 26, 1880, and the failure of the master to pay the wages which they had earned and which were due upon the expiration of said contract, upon October 26, 1880, and that they had left said vessel on

January 23, 1881, after she was put into winter quarters, in order to obtain their wages. The libel in this cause was filed January 25, 1881, nearly three months after the said wages were alleged to be earned. Exceptions were filed by the respondent, master of said schooner, alleging substantially (1) that the libel is irregular, because it does not appear that the court has jurisdiction of the cause in this: *First*, that it does not appear that ten days had elapsed between the time the seamen were entitled to receive their wages and the time of filing their libel; *second*, because the preliminary steps pointed out by sections 4546, 4547, U. S. Rev. St., were not taken before suit was commenced in this court by the attachment of the vessel upon libel filed.

Whatever defect there may have been upon the face of the libel which arose from not disclosing the period of time between the earning of the wages and the filing of the libel, has been corrected by the filing of the amendment rectifying that omission, which the court always allows with great liberality in admiralty proceedings. So that the objection to the court exercising jurisdiction in this suit, because it did not appear that 10 days had elapsed between the earning of said wages and the time of filing the libel, is thus disposed of by the amendment.

It remains only to consider the other proposition of the respondent, going to the full length of requiring the proceedings to be taken under said sections 4546, 4547, U. S. Rev. St., as a prerequisite before this court takes jurisdiction of the cause. We cannot assent to the correctness of this proposition. The practice in this district, and we may say generally, is against it, and the decisions, as opposed to the speculations of eminent law-writers, are against it. This question has been examined at some length by Mr. Sprague, an eminent admiralty judge, who arrives at the conclusion that the acts of congress do not, in all cases, impose a duty on the sailor of proceeding to recover his wages in the manner pointed out in the sections of the Revised Statutes. In fact, he thinks that the statutes did not alter or restrain the

sailor in the pursuit of any remedy he had before the statutes were passed, except as to proceedings *in rem*, leaving the sailor to pursue, at any time after his wages were due, the remedies of suit *in personam* and against the freight. He looks on the statutes as a restriction on the right of the sailor to pursue the remedy of attachment against the ship before the 10 days provided by act of congress expire, except in the cases excepted in the Revised Statutes, viz., a vessel leaving port before 10 days after her cargo is delivered, and a vessel about going to sea. In all cases of proceedings *in rem*, he thinks that the operation of the Revised Statutes delays the filing of the libel until the expiration of the 10 days; but he is without doubt that when that time has expired, he, the sailor, can proceed *in rem* as properly as in the cases excepted in the Revised Statutes. Upon this point (the one which concerns us in deciding this case) his opinion is clear and conclusive.

The other cases cited—by Judge Acheson, of the western district of Pennsylvania, *Murray v. Ferry-boat Nimick*, 2 Fed. Rep. 86; another by Judge Dyer, *The Waverly*, 7 Biss. 465; and another by Judge Longyear, *The M. W. Wright*, 1 Brown's Adm. 290—make no fine distinctions in the matter, but take the ground broadly, that the whole proceedings, as laid down in the Revised Statutes, are merely cumulative, and can be substituted for the old admiralty remedies before the statutes of 1790, or not, as the libellant chooses. We feel disposed to follow these decisions, especially as the uniform practice, as I am informed, has been to proceed in either way the sailor might deem most available to procure the payment of his wages.

As the libel has been amended so as to show the lapse of 10 days after the earning of wages before suit brought, I shall order the case to be referred to United States Commissioner S. Rodmond Smith, to take testimony as to the amount of wages due, and report the same to this court.

LATROBE v. HULBERT, Executor, etc.*

(Circuit Court, S. D. Ohio. ———, 1881.)

1. INTEREST—OHIO—LEGAL RATE—1863 TO 1869—PAYMENTS IN EXCESS.

In Ohio, from April, 1863, to October 1, 1869, 6 per cent. was the highest rate of interest that could legally be contracted for, and all payments in excess of that rate were to be deemed as payments upon the principal, and judgment could be rendered only for the balance.

2. USURY—ESTOPPEL TO PLEAD—RELEASE OF MORTGAGE SECURITY.

A loan, secured by mortgage upon the borrower's property, was made in 1863. An usurious rate of interest was contracted for and paid until 1875. At that time, in order to perfect a sale of a portion of the property mortgaged, the mortgagee released his mortgage upon such portion, in consideration of the payment of all interest then due and half of the principal debt. There was no evidence that the arrangement was made in settlement of the previous usury, and the property remaining was more than sufficient to satisfy the balance of the debt. *Held*, that the mortgagor was not estopped to set up the usury.

3. SAME—LEX CONTRACTUS.

Whether a contract is usurious, is to be determined by the law in force at the time of the making of such contract.

4. USURIOUS CONTRACT—SUBSEQUENT LAW.

At the time of the execution of the contract, the rate of interest stipulated for therein—8 per cent.—was usurious. Subsequently a law was passed which permitted persons to stipulate for that rate. *Held*, that payments of interest thereafter, made in fulfilment of such previous contract, were usurious.

5. USURY—FICTITIOUS PRINCIPAL.

Where the interest paid, is in excess of the legal rate upon the amount actually due at the time of payment, it is usurious.

In Equity.

Lincoln, Stephens & Slattery, for complainant.

Durbin Ward and Jordan & Bettman, for respondent.

SWING, D. J. From the pleadings and evidence in this case it appears that on the tenth day of April, 1863, John W. Coleman borrowed of the complainant, John H. B. Latrobe, the sum of \$25,000 for a period of five years, at 8 per

*Reported by Messrs. Florian Giauque and J. C. Harper, of the Cincinnati bar.

cent. interest, interest to be paid semi-annually; that on that day he executed and delivered to the complainant his promissory note for \$25,000, payable on the first day of May, 1868, and also his 10 promissory notes of \$1,000, payable every six months thereafter, being for the interest on the note of \$25,000, at the rate of 8 per cent., payable semi-annually, and that to secure the payment of said notes John W. Coleman and Lucinda A. Coleman, his wife, executed and delivered to the complainant the mortgage in the bill described, upon real estate therein described, situate in the city of Cincinnati; that on the first day of July, 1866, the complainant, to accommodate Coleman, released said mortgage as to a part of the premises therein described. It further appears that each of said 10 notes of \$1,000 each was paid to complainant by John W. Coleman. It is also stated that, at the request of said Coleman and his executors, the time for the payment of said principal sum was extended from time to time until the first day of August, 1875. From the evidence in the case it appears that at the expiration of the first five years for which the loan was made, the time for its payment was extended by an agreement between the complainant and John W. Coleman for another period of five years, he giving his notes for the interest as upon the original loan; that after that it was extended by agreement between complainant and the executors for a period of one or two years, on the same terms. Upon these points, however, the testimony is not quite clear. It further appears from the evidence that John W. Coleman died in November, A. D. 1868, but whether he paid the first instalment of interest under the extension is not clearly shown. The complainant thinks the notes were given by the executors and paid by them, but I think the weight of the evidence would seem to show that although the interest was paid by the executors, that the notes were given by John W. Coleman. From the evidence it further appears that the property under mortgage was under leases which expired first of May, 1875. Prior to this time the executors had taken steps to sell the property,

and on the fourteenth day of June, 1875, a considerable portion of the property was sold. On the nineteenth day of June, 1875, it seems, from a correspondence between the parties, a negotiation commenced in regard to the release by the complainant of his mortgage upon a part or all of the premises mortgaged, upon his receiving a certain portion of his debt, and notes of the purchasers of the property for the balance. The correspondence upon this question embraced several propositions, but finally ending in an agreement between the parties that complainant, upon the payment to him of \$12,500 of the principal of his debt and of the interest due, would release his mortgage, so far as it related to the property sold. This agreement was consummated on the first day of August, 1875, when complainant received from the executors the sum of \$15,000,—\$2,500 of which was the interest due at that date and \$12,500 upon the principal debt,—and released the mortgage upon the portion of the property which had been sold, amounting to \$18,627.03. Some correspondence passed between the parties after this date, but nothing seems to have been done in regard to the balance of the claim until the bringing of this suit.

Upon the filing of the bill the defendants answer, in substance admitting the execution of the note and mortgage as alleged in the bill, but alleging that there had been paid upon it up to August 1, 1875, 8 per cent. interest, when by law complainant was entitled to but 6 per cent.; that they are entitled to have the 2 per cent. credited upon the principal, which reduces the amount due complainants to \$4,198.58, with interest from first of August, 1875.

By the statutes of Ohio at the time of the execution of the note and mortgage in this case, to-wit, on the tenth day of April, 1863, 6 per cent. was the legal rate of interest, nor could the parties make a legal contract for interest beyond that rate; and all payments of interest made beyond that rate were to be taken as payments made on account of the principal, and the courts were forbidden to render judgment for a greater sum than the balance due after deducting the

excess of interest so paid. By the act of May, 1869, it was provided that "the parties to a bond, bill, promissory note, or other instrument of writing, for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding 8 per cent. per annum, payable annually." This act took effect and was in force on and after the first day of October, 1869. Prior to the taking effect of this act, therefore, the parties could not legally contract for and receive a greater rate of interest than 6 per cent. Having contracted for and received 8 per cent., the excess of 2 per cent. must be deemed and taken as payment made upon the principal, unless the parties, by their subsequent acts, have deprived themselves of, or have waived, the right to insist upon such application of the excess so paid. And it is claimed by the complainants that the agreement and arrangement of the first of August, 1875, had this effect; that by this contract there was a full and complete settlement of all interest which had been paid, and an ascertainment of the amount due up to that date, and the payment thereof, and a payment of the sum of \$12,500 of the principal debt, upon the consideration that complainant would release a portion of his security, and that was done; and that this was the making of a new contract, which shuts out and precludes the defence of usury which before that time had existed. The defendants insist that the agreement and arrangement of the first of August did not have the effect claimed for it by the complainant; and, if it should be held by the court to have such an effect, that the executors had no authority in law to make it.

This leads us to inquire into the nature and character of the transaction of August 1, 1875. Was it a settlement and payment of the excessive interest which before that time had been paid and agreed to be paid? And was the release of a portion of the mortgage premises made in consideration of such settlement and payment?

I have looked through the testimony carefully, and I think I may safely say that prior to that date no question had arisen

between the parties as to whether the rate of interest paid or agreed to be paid was legal or in excess of that allowed by the law. It had not been discussed, and certainly such a question was not discussed upon that day. The only question had been and was, as to the amount of the proceeds of the sale the complainant should receive upon his releasing the property sold,—the complainant desiring to receive the full amount of the proceeds of the sale, and the executors desiring to retain an amount for costs and expenses; and the parties finally agreed that the complainant, upon receiving \$2,500, the interest then due, and \$12,500 upon the principal, should release the property sold. Nothing was said then or during the entire negotiation that the release was in consideration of a settlement and adjustment of the illegal interest which had been paid or was then being paid. I think, therefore, as a question of fact, that the release was not made upon the consideration of a settlement and adjustment of the excess of interest before and at the time paid.

This being so, there is nothing in the agreement itself which gives it the legal effect of estopping the defendants from setting up the usury in this case; and the remaining property covered by complainant's mortgage, not being injured by that released, and being amply sufficient for the payment of the balance due complainant, equity does not require that it should be so construed.

It is claimed, however, by complainant's counsel, that admitting the arrangement of August, 1875, did not estop the defendants from setting up usury, that as to all payments of interest subsequent to the first day of October, 1869, they cannot be held to be usurious; for, by the law then in force, parties were authorized to contract for the payment of 8 per cent. interest, and, having paid what they might have contracted for, such payments are not usurious.

If my view of the testimony be correct, that the contract for the extension of five years was made with John W. Coleman, it was made before the law of 1869 was passed, and the contract itself was usurious. The subsequent payments of

interest were therefore payments under and in discharge of a contract which was, under the law when entered into, an usurious contract. The law of 1869 did not legalize usurious contracts; it only permitted parties after its passage to make contracts which before that time were usurious; and it is a well-settled principle of law that whether a contract is usurious must be determined by the law in force at the time of its execution. In both the case of *Samyn v. Phillips*, 15 Ohio St. 218, and that of *Mueller v. McGregor*, 28 Ohio St. 265, the original contracts under which the interest was paid were under the 10 per cent. law, and the payment of the interest subsequent to the time limited by the contracts was a payment of that which, if the original contract had continued, would have been the legal rate of interest. I think, therefore, that the doctrine of these cases cannot apply to the present case, and that the payment of 8 per cent. was in fulfilment of a contract usurious when made, and must be held to continue so even after the passage of the act of 1869.

But, aside from this, the rate of interest which was paid was greater than 8 per cent. upon the amount which was legally due at the time of its payment; and this latter view applies to any interest paid by the executors after the expiration of the term of five years extended by the agreement of J. W. Coleman. These views render unnecessary any examination of the question as to the power of the executors under this will.

It follows, from the conclusions arrived at, that all payments of interest involved usury, and that the excess above 6 per cent. must be applied as payments upon the principal debt, and a decree entered for the payment of the balance found due.

FIRST NAT. BANK OF HANNIBAL, MISSOURI, v. SMITH and others.*

SAME v. BIGELOW and others.

(Circuit Court, D. Massachusetts. September 6, 1879.)

1. CIRCUIT COURT—JURISDICTION.

A circuit court cannot entertain a suit where a party, whose legal presence in the proceeding is necessary, cannot be subjected to its jurisdiction.

2. NECESSARY PARTY—CORPORATION.

A corporation is a necessary party to a suit for collecting moneys due for unpaid assessments of its stock, or for capital once paid in, but afterwards improperly divided.

3. SAME—NATIONAL BANK.

Quere, whether a national bank can maintain a suit in a circuit court, other than the district in which such association is established.
—[Ed.]

In Equity. Demurrer.

B. Wadleigh and F. P. Fish, for complainants.

Russell & Putnam, Wm. P. Wilson, and Sidney Bartlett, for defendants.

NELSON, D. J. These cases were argued together and present the same questions for decision.

The plaintiff is a banking association established in the state of Missouri under the acts of congress providing for national banking associations. It is described in the amended bills as "a citizen of the state of Missouri, and located and residing in the city of Hannibal, in said state of Missouri." The defendants are all citizens of Massachusetts. The North Missouri Coal & Mining Company and the Pacific Coal & Mining Company are corporations created by the laws of Missouri. One of the questions raised by the demurrers, and argued with great learning and ingenuity by counsel on both sides, was whether a national banking association can maintain a suit in the circuit courts of the United States, except

*See *Dornitzer v. Illinois & St. Louis Bridge Co.*, *infra*.

in the district where the association is established. The view I have taken of the cases renders it unnecessary to pass upon this question, and I allude to it only that it might appear the point was not overlooked in this discussion.

But, assuming that the plaintiff can sue in this court, I am of the opinion that one of the other objections raised by the demurrers is well taken. The plaintiff's bills, as amended, pray in substance that the defendants may be required to account for unpaid subscriptions to stock and dividends, received out of capital as assets of the insolvent corporations, and that these assets may be applied in payment of certain judgments which the plaintiff has recovered against the corporations. It is too clear to admit of discussion that the corporations are necessary parties to suits like these. Unless they are made parties, they will not be concluded by decrees made in the cases on the merits, and the defendants might be called upon a second time to account for the same assets at the suit of the corporations, or receivers appointed over their affairs. The defendants have the right to insist that the decree shall conclude the plaintiffs, the corporations, and all other creditors, and afford a full and complete protection against future suits for the same causes of action. Such decrees cannot be made in suits when the corporations are not parties, or by a court having no jurisdiction to require the legal presence of the corporations in the proceedings. *Wood v. Dumme*, 3 Mason, 308, 316; *Shields v. Barron*, 17 How. 130; *Ogilvie v. Knox Ins. Co.* 22 How. 380; *Barney v. Baltimore*, 6 Wall. 280; *Davenport v. Dows*, 18 Wall. 626; *Kendig v. Dean*, 97 U. S. 423; *Tremain v. Amory*, decided by *Lowell, J.*, in the first circuit at Boston, June, 1879.

The rules which govern the circuit courts of the United States in cases like these are well settled. The court refuses to entertain a suit where a party, whose legal presence in the proceeding is necessary, cannot be subjected to its jurisdiction. *Kendig v. Dean*; *Barney v. Baltimore*; *Tremain v. Amory*, *ubi supra*.

As the corporations have not been and cannot be made

parties to these suits for want of jurisdiction of the court over them, the demurrers must be sustained and the bills dismissed without prejudice.

Ordered accordingly.

**DORMITZER and others v. ILLINOIS & ST. LOUIS BRIDGE
COMPANY and others.**

(Circuit Court, D. Massachusetts. January 29, 1881.)

1. CIRCUIT COURT—JURISDICTION.

A circuit court has no jurisdiction of a civil action between ordinary parties, either originally or by removal, if any of the necessary parties to the controversy on opposite sides are citizens of the same state.

2. NECESSARY PARTY—CORPORATION.

A corporation is a necessary party to a suit for collecting moneys due for unpaid assessments of its stock, or for capital once paid in, but afterwards improperly divided.

3. CIRCUIT COURT—JURISDICTION.

A circuit court cannot entertain a suit where a party, whose legal presence in the proceeding is necessary, cannot be subjected to its jurisdiction.

4. SAME—ATTACHMENT.

A circuit court cannot attach the property of an absent defendant, unless he is an inhabitant of the district where the suit is brought.—
[Ed.]

In Equity. Demurrer.

Warren & Brandeis, for complainants.

Russell & Putnam and *Edwin H. Abbott*, for defendants.

LOWELL, C. J. Of the points so ably and thoroughly argued I shall concern myself with but one. It is generally understood to be settled by *The Removal Cases*, 100 U. S. 457, and *Pacific R. Co. v. Ketchum*, 101 U. S. 289, that under the statute of 1875, as well as under former acts, circuit courts of the United States have no jurisdiction of a civil action between ordinary parties, whether originally or by removal, if any of the necessary parties to the controversy on opposite sides are citizens of the same state. It may be said that this

point is not necessary to the decision of those cases; but the whole discussion, and the distinctions taken in them, were unnecessary unless the law was so; and it is so announced by the chief justice. Before these decisions were published I had occasion to examine the question, and came to the conclusion that, within the reasoning of the case of *The Sewing Machine Companies*, 18 Wall. 553, and of earlier cases, this must be the construction. *Tremain v. Amory*, June, 1879 (MSS.) and see *Donahoe v. Mariposa Co.* 5 Sawy. 163; *Ruckman v. Palisade Co.* 1 FED. REP. 367; *Bailey v. N. Y. Sav. Bank*, 2 FED. REP. 14; *Ruble v. Hyde*, 3 FED. REP. 330.

It unfortunately is the case that congress has not seen fit to entrust the circuit courts with power to proceed by attachment of property against an absent defendant unless he is an inhabitant of the district where the suit is brought. *Toland v. Sprague*, 12 Pet. 300. A recent statute gives these courts jurisdiction to enforce a lien upon or claim to, or remove an encumbrance or lien or cloud upon the title to, real or personal property within the district, though the defendants, or some of them, may not be either inhabitants thereof or found therein, first giving notice to the absent defendants. St. 1875, c. 137, § 8; 18 St. 472. But this means a lien or title existing anterior to the suit, and not one caused by the institution of the suit itself. These courts, therefore, have a very limited jurisdiction by foreign attachment: an important process, which derives its very name from the absence of the defendant, and which the state courts make use of with advantage to plaintiffs and without injustice to defendants. If, then, a corporation is a necessary party to a suit for collecting moneys due for unpaid assessments of its stock, or, which is very similar, for capital once paid in, but afterwards improperly divided, this bridge company, which is incorporated by the state of Missouri, of which state the plaintiff is a citizen, cannot be summoned in as a defendant in the district of Massachusetts.

Under the two recent decisions first above cited, the company, if it could be brought before the court in some way,

might, by its pleading, or its conduct, show that there was no actual controversy between it and the plaintiff, and then the court would not lose its jurisdiction. But it is not here, and cannot be required to come here.

That a corporation is a necessary party to such a suit was decided by Judge Nelson, in this court, in September, 1879, (*First Nat. Bank of Hannibal v. Smith, supra*, 215;) and this bill, in effect, asks for a review of that decision. The present proceeding is a creditor's bill to enforce a sort of equitable garnishment. Now, I have never seen a case of a creditor's bill, or a garnishment, when brought under the ordinary practice of either law or equity, in which the principal debtor was not made a party defendant when it was possible. Of course, the defendant may be absent, or out of reach; and, as I said before, one of the most important uses of a garnishment is to apply the property of an absent debtor to the payment of his debts within the territorial jurisdiction of the court; but the usages or the statutes by which the courts work out this result give them a jurisdiction *in rem* which the statutes of the United States deny to the circuit courts, in suits at law or in equity, excepting as above mentioned. This distinction must be kept in mind in examining the cases. In a court of general jurisdiction, the presence of the debtor is admitted to be necessary, but an artificial or constructive presence, or a supposed contumacy, is substituted for actual presence; and this is what the circuit courts cannot effect.

The corporation is a necessary party, actual or constructive, because it will not else be bound by the decree, and the other defendants may be twice vexed. It has also the right to show that the judgments against it have been satisfied, or that it has the means for satisfying them without further assessment. As a rule in equity it may be stated more broadly that the suit is one which, if the allegations of the bill are true, the corporation was bound to institute; and if it fails to do so, it is a necessary party on one side or the other of the suit, in order that its rights in its own assets may be properly cared for. See *Cunningham v. Pell*, 5 Paige,

607; *Spear v. Grant*, 16 Mass. 9; *Wood v. Dummer*, 3 Mason, 308; *Davenport v. Dows*, 18 Wall. 626; *Lyman v. Bonney*, 101 Mass. 562; *Deerfield v. Nims*, 110 Mass. 115; *Mann v. Pentz*, 3 N. Y. 422.

The three cases cited by the plaintiff were all decided under a code which expressly makes it discretionary with the judge to order notice to the principal defendant or not. The only possible question, therefore, was of the constitutionality of the statute. *Gibson v. Haggerty*, 37 N. Y. 555; *Bishop v. Garcia*, 14 Abb. Pr. (N. S.) 70; *Lynch v. Johnson*, 48 N. Y. 27. The case of *Hatch v. Dana*, 101 U. S. 205, did not turn upon this point. It appears that the corporation was made a party and afterwards dropped; but no question was raised about it. The corporation may have made no issue with the plaintiff, or all parties may have agreed to the dismissal. The question argued and decided was whether all stockholders must be parties.

I cannot see how it is possible, consistently with the decisions and the uniform practice, to decide this case in the absence of the corporation. If it had been actually dissolved, the case might be different. There are allegations which come as near to that as truth will permit, I suppose: that it has ceased to do business; that its bridge has been sold under a foreclosure; and that it is defunct "to all intents and purposes." I do not understand this to mean that it is no longer capable of suing and being sued, but that it is dead for all useful purposes as a bridge-owner. If it remains subject to process, the facts alleged appear to be immaterial. I infer, from the facts which are stated, that it is still liable at present.

Demurrer sustained.

CITY OF ST. LOUIS v. THE KNAPP, STOUT & CO. COMPANY.

(Circuit Court, E. D. Missouri. ———, 1881.)

1. INJUNCTION—NUISANCE—NAVIGABLE RIVER.

A court of equity will not enjoin the erection of a runaway for logs, upon the ground that it will divert the course of a navigable river, unless it appears that the threatened structure will be a nuisance *per se*.

2. NUISANCE—RIVER.

A structure in the channel of a river will not necessarily be held subject to abatement as a nuisance.

Pennsylvania v. Wheeling Bridge Co. 13 How. 518.

3. INJUNCTION—NUISANCE—PARTY TO BILL.

It seems to be well settled that a bill in equity to enjoin or abate a public nuisance must be filed by one who has sustained, or is in danger of sustaining, special damages.—[Ed.]

On Demurrer to Bill.

Leverett Bell, for plaintiff.

George M. Stewart and C. H. Krum, for defendant.

MCCRARY, C. J. The bill avers that the eastern boundary of the city of St. Louis is and always has been the middle of the main channel of the Mississippi river, and that complainant is the proprietor of the bed of the river within the city limits, and that by its charter the complainant is authorized to construct all needful improvements in the harbor, to control, guide, or deflect the current of the river, and to erect, repair, and regulate public wharves and docks; that by proper ordinance the lines of the wharf have been laid down and established upon a certain piece of real estate in the northern part of the city, particularly described in the bill.

It is further averred that defendant is erecting a saw-mill on its property, and that, for the purposes of hauling logs from the river into its mill, the defendant is erecting a runaway for logs, which will extend some hundred feet from the western edge of the water of the river, and is driving piles, as a foundation for the runway, into the bed of the river east of the eastern line of the wharf as established by the city under the ordinance aforesaid; that north and south of the defend-

ant's premises portions of the wharf have been completed, and are being used as landings for boats running on the river; that the effect of driving the piles in the bed of the river and constructing the runway as aforesaid will be to divert the navigable water of the Mississippi river from its natural course, and to throw it east of its natural location, and from along the river bank north and south of said runway and piling.

It is further averred that the construction of said runway will create in front of and upon plaintiff's improved wharf, as aforesaid, a deposit of mud and sediment, so that it will be impossible for boats and vessels engaged in the navigation of the Mississippi river to land at the improved wharf aforesaid, north and south of the defendant's said premises.

The prayer of the bill is that defendant, its agents and servants be forever enjoined from driving piles and constructing its runway east of the western water's edge, in front of defendant's premises; and that it be ordered to remove such piles as it has already driven there, and all portion of said runway already constructed there by it; and that the plaintiff have such other and further relief in the premises as it may be entitled to, etc.

The respondents demur to the bill, and by their demurrer they raise the following questions: *First*, whether the bill, upon its face, shows that the construction of the runway in question will intrude upon plaintiff's rights, and cause special damage; *second*, whether, upon the allegations contained in the bill, complainant is entitled to decree in advance of the construction of the runway, and to prevent its completion.

It will not be necessary, upon the consideration of this demurrer, to finally decide the first question presented. It seems, however, to be well settled that a bill in equity, to enjoin or abate a public nuisance, must be filed by one who has sustained or is in danger of sustaining special damages. It is true that one of many persons, all of whom have been damaged by a public nuisance, may bring a bill in behalf of himself and all others who are in like situation, who are or may be injured; and it is by no means necessary to

join in such suit all persons who have sustained injury; but it is clearly necessary that the complainant should show that he has sustained or is in danger of sustaining individual damage. It is, to say the least, doubtful whether the bill in this case brings the complainant within this rule. *M. & M. R. Co. v. Ward*, 2 Black, 485; *Irwin v. Dixon*, 9 How. 10.

Upon the second question there is less room for doubt. The respondents are proceeded against to prevent a construction which, it is averred, will be a nuisance if completed. The structure complained of has not been built, but is in the course of construction. The bill avers that, if constructed, it will be an obstruction to navigation, and will result in damage to the complainant. Courts of equity rarely interfere by injunction against threatened nuisances. To justify such interference the case must be clear; that is to say, it must appear that the threatened structure will, if erected, be a nuisance *per se*. If it may or may not become so, a court of equity will not interpose in advance to prevent its erection, especially in a case like the present, where it appears that the structure complained of is about to be erected in the river by a riparian proprietor, who has an undoubted legal right to place it and maintain it there, if his doing so does not interfere with navigation, or damage others. Where it can be said that it is uncertain whether the structure, if erected, would be an obstruction to navigation, or injurious to complainant's rights, equity will not interfere. *High on Injunctions*, § 488.

It is true that the bill alleges in general terms that the effect of driving the piles in the bed of the river, and constructing the runway as proposed by respondent, will be to divert the navigable water of the river from its natural course, and also to cause the deposit of mud and sediment, so as to prevent boats from approaching it, or landing at the improved wharf provided by complainant. But this is only the expression of an opinion or apprehension on the part of the complainant. The runway, when constructed, may not produce the results apprehended, and it seems to be well settled that it is not enough for the complainant to allege that particular

consequences will follow the erection of the structure complained of. Such facts must be stated as will enable the court to say and determine whether the allegation is well founded. *Adams v. Michael*, 38 Md. 123

It is very clear that a public navigable stream must remain free and unobstructed, and that no private individual has the right to place any permanent structure within the navigable channel. *Atlee v. The Pkt. Co.* 21 Wall. 389; *State of Pennsylvania v. Wheeling Bridge Co.* 13 How. 518.

If the respondent proceeds to construct the runway as proposed, it does so at its own risk, and must understand that, when the same is completed, if it proves to be an obstruction to the free navigation of the Mississippi river, or a special injury to the rights of others, it may be condemned and removed as a nuisance. But it is not every structure in the channel of a river that will be held to be subject to abatement as a nuisance. In the *Wheeling Bridge Case*, *supra*, a bridge across the Ohio river, constructed without authority from congress, though held to be a nuisance as originally constructed, was allowed by the supreme court to remain, upon the condition that there should be constructed a suitable and practicable draw, so as to afford reasonable facilities for the passage of vessels.

My conclusion in this case is that an injunction cannot be granted upon the allegations of the bill, and that the demurrer thereto must be sustained. The right to proceed against the respondent for erecting a nuisance within the navigable channel of the river will remain to any person or persons having a right to institute such proceedings, in the event that the structure, when completed, shall prove to be a nuisance.

RUCKMAN by her next friend, etc., v. RUCKMAN and others.

(Circuit Court, D. New Jersey. March 22, 1881.)

1. DELIVERY OF DEED—EVIDENCE OF INTENTION.

It is not necessary, in order to constitute a delivery of a deed, that it should be in fact handed over to the grantee, or to a person in trust for him; but, where there is no actual handing over of the deed, some act must be done, or word spoken, to indicate such an intent, in order to make it effectual.

2. SAME—HUSBAND AND WIFE.

Held, therefore, where a married man procured a mortgage to be taken in the name of a third person, and caused the same to be assigned to his wife, but retained possession and control of both the mortgage and assignment, that the mere promise to give the same to his wife did not constitute a delivery.—[Ed.]

In Equity. On Bill, etc.

NIXON, D. J. This is a suit for the foreclosure of a mortgage, originally brought in the court of chancery of New Jersey by Margaret Ruckman against James H. Marley, John F. Brylan, and the husband of the complainant, Elisha Ruckman, and removed into this court on the petition of the defendant Ruckman.*

The bill alleges that in the month of September, 1878, the defendant Marley applied to Elisha Ruckman for the loan of \$5,000 on mortgage; that the loan was made, and in order to secure it the said Marley and wife executed a bond and mortgage to the defendant Brylan, bearing date September 28, 1878, and that shortly afterwards the said Brylan made and executed an assignment of the same to the complainant, whereby the title to the bond and mortgage became vested in complainant. It further sets forth that the bond, mortgage, and assignment were not in the possession of the complainant, but were in the possession of the defendants Ruckman and Brylan, or one of them; that she was entitled to the same, and the money due thereon, as her separate estate, and prays that Ruckman may be decreed to pass over to the complainant the original bond and mortgage, and assignment,

*See 1 FED. REP. 367; Id. 587.

if in his possession or under his control; that the same decree may be entered against Brylan, if they should be in his possession or under his control; and that Marley may be decreed to pay the mortgage debt and accrued interest to the complainant, and may be protected by the decree of the court from the bond and mortgage, if they should not be in the hands of the complainant to be surrendered and cancelled on the payment and discharge of the same.

The defendant Elisha Ruckman, in his answer, admits the loan of \$5,000 by him to Marley, and the execution of the bond and mortgage to Brylan to secure the payment thereof; and also the execution of an assignment of the same to the complainant; but he claims that he retained the possession of the papers; that they were never delivered to the complainant; that no gift was made by him to her, nor intended to be made; and that after she deserted his bed and board, to-wit, about the tenth of March, 1879, he surrendered the assignment, which had been formally made to the complainant, to Brylan, to be destroyed, and also delivered to him the bond and mortgage, in consideration of which Brylan gave to him his promissory note for \$5,000, payable in one year from September 27, 1878,—the date of the mortgage,—and that he had no further interest in the same. Although hundreds of pages of testimony have been taken, the only question in the case is whether the complainant is the owner of the bond and mortgage on which the suit is founded. If she is not, her action must fail, whoever else the owner may happen to be. And this question is determined when we ascertain whether the complainant has shown a sufficient delivery to render the assignment effectual to vest in her the title to the mortgage. The complainant herself has been examined, and I have carefully read her testimony upon this point. It falls short of the legal requirements in such a case. She does not pretend that the papers were ever in her possession or delivered to her. The most that she claims is that they were promised to her. The substance of her evidence is that Ruckman, her husband, told her on several occasions that he would make such a loan for her benefit; that he afterwards informed her he had done

so, and that the mortgage was hers, and that after their separation he promised to send it to her, but never did so.

It is not insisted that in order to constitute the delivery of a deed it is necessary that it should be in fact handed over to the grantee, or to a person in trust for him; but where there is no actual handing over of the deed some act must be done, or word spoken, to indicate such an intent, in order to make it effectual. Its mere execution, or putting it on record after execution, without the knowledge of the grantee, is not sufficient. Washburn says: "A delivery of a deed is as essential to the passing of an estate as the signing; and so long as the grantor retains the legal control of the instrument, the title cannot pass any more than if he had not signed the deed. * * * So long as the deed is within the control of the grantor, and subject to his authority, it cannot be held to have been delivered." 3 Washb. R. P. 577, 580. To the same effect are the cases of *Crawford v. Berthoff*, Saxton, 467; *Folley v. Vantuyl*, 4 Hal. L. 158; and *Cannon v. Cannon*, 11 C. E. G. 319. I can find no evidence tending to show that the bond, mortgage, or assignment was ever out of the possession or control of the defendant Ruckman, or that he ever performed an act indicating an intent to make a delivery of them to the complainant. A naked voluntary promise is not enough to support a gift of a chattel, unless it is followed by some performance.

Failing to establish any title to the mortgage, the bill of complaint must be dismissed.

DOUGLAS, by her next friend, etc., v. BUTLER and another.

(Circuit Court, D. New Jersey. March 15, 1881.)

1. EQUITY PRACTICE—SUIT BY MARRIED WOMAN—HUSBAND A PARTY TO THE SUIT.

In a suit by a married woman, the husband should be joined in all cases where they have no antagonistic interests; but if it be otherwise, she should file her bill by her next friend, and make her husband a party defendant.

Birn v. Heath, 6 How. 248.

2. SAME—AMENDMENT.

Such defect of parties may be cured, however, by amendment.

Johnson v. Vail, 1 McC. 426.

3. TAX SALE—REDEMPTION—TENDER.—[Ed.]

In Equity. On Bill, etc.

F. C. Lowthorp, Jr., for complainant.

James Buchanan, for defendant.

NIXON, D. J. This bill was originally filed in this case by a husband and wife against the defendant, to compel a surrender of the title and possession of certain real estate, situate in the city of Camden, New Jersey, to the wife, as her separate property; and at the outset we are met with the objection that the bill is fatally defective for the want of proper parties. The counsel of the defendant Butler insists that the correct practice in equity does not allow the wife to make her husband a co-complainant, but that she should have sued by her next friend, and brought in her husband as a defendant. The old rule in such cases was to permit the wife to join her husband with her in the action—although there was no prayer for his relief—in all cases where the husband and wife had no antagonistic interests; but where these were likely to arise in the proceedings, the wife was required to file the bill by her next friend, other than her husband, and to make the husband a defendant.

This rule was expressly sanctioned by the supreme court in *Birn v. Heath*, 6 How. 248, in which it is said: "Where the wife complains of the husband and asks relief against him, she must use the name of some other person in prose-

cuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court," etc. But the objection is not reckoned of much practical importance, as all the authorities agree that, where such a defect in the parties is brought to the attention of the court, the practice is not to dismiss the bill, but to give permission to the wife to amend by adding a next friend, and making the husband a defendant. *Johnson v. Vail*, 1 McC. 426.

As the learned counsel for the defendant came into the case after the final hearing, and was permitted, by the courtesy of the counsel of the complainant, to file a brief in reply to his brief, it was not, probably, within his knowledge that such permission was craved by the complainant at the hearing, and granted by the court; and that, subsequently, John Cruikshank, on his own application, was allowed to enter his name in the suit as the next friend of Mary M. Douglas—the husband, Robert J. Douglas, being made a defendant.

The bill of complaint is filed by Mary M. Douglas, by her next friend, against Dempsey D. Butler, claiming that before the first day of November, 1872, she was the owner in fee-simple of two separate tracts of real estate in the said city of Camden, with a number of tenement-houses standing thereon, of the value of \$7,000 or \$8,000; that, residing out of the state, she had the property placed in the hands of an agent, to lease the houses and collect the rents; that about the seventh of February, 1873, she received a letter from her agent stating that the tenants refused to pay to him any more rent, the defendant Butler having served notice upon them that he claimed the rents as the purchaser of the property on a public sale made by the city for non-payment of the taxes; that the complainant's husband, on her behalf, immediately went to the city of Camden, and had an interview with the defendant Butler, and requested from him a statement of the amount of money, including all costs and expenses, paid by him on said tax sales, with the expressed desire and purpose of paying the full amount of the claims of the defendant; and that

he refused to comply with said request, not only upon that occasion, but upon several subsequent interviews had during the months of March and April following, when he was visited for the like purpose.

The bill also alleges that on or about the fifth of May, 1873, the complainant, in company with her husband and one George Greeley, had another interview with the defendant in the city of Camden, having first obtained from the receiver of taxes a statement of the amount for which the property had been sold for taxes, and the several sums paid by the defendant, and then tendered to him in the presence of said witnesses \$350, and requested him to take therefrom all sums due to him by virtue of the tax sales, and to release and surrender the said real estate, and that the defendant refused to accept the said money, or any part thereof, or to release and surrender the said property; that another tender was made to the defendant in the presence of James and Tobias Johnson about the sixth day of October, 1874, of the sum of \$600, and still another of the thirty-first of October, 1874, by C. A. Bergen, Esq., on behalf of complainant, and in presence of George W. Humphreys, of the sum of \$500, both of which were refused by the defendant, he alleging in both instances that the amounts so tendered were not sufficient to cover his payments and expenses, and at the same time refusing to give to complainant any statement of what sums he had paid and expended on account of the said real estate.

The bill further alleges that the complainant had been always ready and willing, and was still ready, to pay to defendant all amounts of money required to redeem said property, and prays that the defendant may be decreed to surrender the possession of said real estate and premises; to release and quitclaim all the defendant's (Butler's) right, title, and interest therein, acquired by virtue of said tax sales, and to pay to complainant an amount equal to all the rents and profits accruing and received from said real estate from February 7, 1873, in excess of the amounts for which the property was sold for taxes.

The answer of the defendant Butler, in substance, denies the title of the complainant to the real estate described in the bill, and the tenders claimed to have been made to the defendant, or, at least, their legal sufficiency. He also claims the right to continue to hold the several lots of land by virtue of certain tax titles acquired at the times specifically set forth. It is important to observe the dates when his title begins to run, as it has an important bearing upon the question of the tenders alleged to have been made at different times.

(1) The two lots on the north side of Cherry street, 60 feet front and 100 feet deep, by deed or declaration of sale dated February 27, 1862; the same being sold to the defendant for the term of 125 years for the sum of \$32.50, amount due from Elizabeth Thomas, then owner, for unpaid taxes assessed thereon.

(2) Two frame houses and lots of land, situate Nos. 230 and 232 Spruce street, 60 feet in front by 200 feet, to Cherry street, by declaration of sale dated November 29, 1872; sold as the property of John S. Bundick, agent, the owner, or reputed owner, for the term of 50 years, for \$41.95, the amount due for taxes, etc., for the year 1871. The half of said lot, lying on Cherry street, is the same premises as those described in the above declaration, No. 1.

(3) A lot of land at the north-east corner of Newton avenue and Chestnut street, by declaration of sale dated November 29, 1872; sold as the property of Mary M. Douglas, for the term of 15 years, for the sum of \$21.03, the taxes, interest and costs for the year 1871.

(4) One other lot of land, situate at the north-east corner of Chestnut street and Newton avenue, triangle, by deed dated March 27, 1873; sold as the property of Mary M. Douglas, for the term of 300 years, for \$9.45, the amount due for culvert assessment for the year 1870.

(5) One other lot, situate as aforesaid, 100 feet on Newton avenue and 75 feet on Chestnut street, by deed dated February 27, 1874; sold as the property of Mary M. Douglas, for the term of 100 years, for \$22.79, due for taxes, etc., for the year 1872.

(6) A lot of land at the north-east corner of Chestnut street and Newton avenue, triangle, by deed dated October 26, 1876; sold as the property of Mary M. Douglas, for the term of two years, for \$18.71, for taxes, etc., due for the year 1874. This appears to be the same lot as No. 4, above described.

(7) Three frame houses and lots of land, situate at Nos. 1020, 1022, and 1024 Newton avenue, by deed dated November 29, 1872; sold as the property of Mary M. Douglas, for the term of one year, for \$36.90, due for taxes, etc., in 1871.

(8) The same lots lastly described, by deed dated March 27, 1873; sold as the property of Mary M. Douglas, for the term of 300 years, for the sum of \$17.40, the amount due on assessment for culvert in 1870.

(9) The same lots, by deed dated October 26, 1876, again sold as the property of Mary M. Douglas, for the term of two years, for \$36.29, amount of taxes, etc., in 1874.

(10) A lot of land on the west side of Broadway, 40 feet north of Chestnut street, being 98 feet in front and 60 feet in depth, by deed dated January 2, 1873; sold as the property of Mary M. Douglas, for the term of 90 years, for \$41.25, taxes assessed for the year 1871; and again sold October 26, 1876, as the complainant's, for the term of two years, for \$40.31, amount of taxes, etc, for the year 1874.

The defendant further claims that he has paid for taxes and assessments, on the several lots thus held by him, as follows: On the twelfth of January, 1874, to A. Hugg, city solicitor, \$32.77, for taxes on the lots described above, in No. 7, for the year 1872; and on the twenty-first of January, 1874, the further sum of \$4.30, for culvert assessment. On the first of August, 1874, to A. C. Jackson, receiver of taxes, \$21.84, the taxes on Nos. 1 and 2 for 1874, less 5 per cent. for prompt payment; and on the twenty-second of September, 1874, to A. Hugg, city solicitor, the further sum of \$36.77, the taxes assessed on the same property in 1873. On the twelfth of January, 1874, to A. Hugg, city solicitor, \$36.56, for taxes, etc., for 1872, on the above-described lot in No. 10. On the twelfth of January, 1875, to A. Hugg, city solicitor, \$17.59,

for taxes and costs for 1872 on the real estate described in 3, 4, 5, and 6, at north-east corner of Newton avenue and Chestnut street. On the twelfth of January, 1874, to A. C. Jackson, tax receiver, \$58.25, taxes on all the above-described lots, except Nos. 1 and 2, for the year 1873. On the twenty-first of April, 1874, to Alfred Hugg, solicitor, \$72.58, for paving Newton avenue, between Broadway and Chestnut, including interest, costs, and expenses.

The defendant, in his answer, further avers that he has always been ready and willing, and is now ready and willing, to surrender all right and claim to the said real estate to the owners thereof, upon being re-imbursed the purchase money paid by him to the city of Camden, and interest at the rate of 12 per cent. per annum, and all expenses and charges necessarily incurred in regard to said property.

After such voluntary offer by the defendant not much remains to be done in the case except to ascertain (1) who are the owners of the real estate in controversy, and (2) what sum remains due to the defendant for the money paid for taxes and assessments.

As to the first question, the evidence shows clearly that the complainant, Mary M. Douglas, is the owner. She purchased the lots on Spruce and Cherry streets of James H. Tucker and wife, by deed dated September 8, 1868, and duly recorded, in which the grantor claims to have been the son and only heir at law of his father, Samuel Tucker, the former owner. There is nothing to impeach this title except the allegation of the defendant Butler that the said James once told him that he was not the son of Samuel, and that his only heir at law was a niece, one Mary Laurens. All the testimony upon the subject is mere hearsay, which has no weight against the *prima facie* evidence of the deed. James H. Tucker was within reach of the defendant, who ought to have proved the allegation by him, if it were a fact capable of proof. She became the purchaser of the lots at the corner of Newton avenue and Chestnut street by deed from Edward Miller and wife, dated December 7, 1858, and duly recorded. There was an attempt to invalidate this title by alleging that

the real estate was in fact the property of the complainant's husband, Robert J. Douglas, although the deed had, for fraudulent purposes, been taken in the name of the wife; that it had been seized under a writ of foreign attachment issued against the husband for his debts, and his interest therein sold by auditors appointed in the attachment proceedings, and a title given to other parties. But there was no evidence to support these allegations in regard to the ownership of the husband, and it is hardly necessary to say that the wife's title cannot be successfully defeated, except by some proceeding in which she is a party, and has the right and opportunity to be heard.

We are, then, brought to consider whether the complainant, as owner, has the right to redeem the property described; and, if so, what amount of money is necessary to be paid for the redemption. The sixty-fourth section of the act to revise and amend the charter of the city of Camden, approved February 14, 1871, (Pam. L. 1871, p. 210,) makes all taxes and assessments a lien upon the real estate for five years after the same shall have been assessed, and authorizes the city council, on failure of the owner to pay and satisfy the full amount of such tax or assessment, to sell the premises at public auction for the shortest time, not exceeding 100 years for unimproved property, and 50 years for improved property, and to execute, under the seal of the city, a declaration of sale to such purchaser. The sixty-fifth section reserves to the owner the right of redemption, within two years from the date of sale, on the payment of the purchase money, with interest at the rate of 12 per cent. per annum, to be computed from the day of sale, and all the expenses and charges necessarily incurred thereon by the purchase aforesaid.

The bill of complaint contains several vague allegations about tenders by the husband of the complainant in her behalf, but only two are specifically stated,—one on the fifth of May, 1873, and the other on the thirty-first of October, 1874,—both of which are within two years of the date of sale of all the property, except the lot on Cherry street, which the defendant claims to have purchased February 27, 1862,

on a tax sale for taxes assessed against one Elizabeth Thomas. But the evidence clearly shows that the former owner redeemed the lot some years before the complainant became the purchaser, and that the fraudulent claim of the defendant has been made possible by the fact that Butler has become the administrator of the estate of Elizabeth Thomas, and as such has and keeps control of the papers, which prove that the lot was duly redeemed.

The tenders, then, being in time, were they legal in form and sufficient in amount? I do not inquire into the tenders which the testimony shows were made in the presence of the two brothers, James and Tobias Johnson,—the first, of \$350, in the month of February, 1873, and the second, of \$600, on the sixth of October, 1874,—because the proof cannot be broader than the allegations of the bill, and I am not able to find anything in the bill, in regard to tenders at those dates, definite enough to put the defendant upon his defence. But the complainant charges that on the fifth of May, 1873, she and her husband and one George Greeley found the defendant in the city of Camden, and then and there counted out to him \$350, and requested him to take from that sum enough to re-imburse himself for the money he had paid for taxes and assessments on the real estate of the complainant, which he then held by tax title, and that the defendant declined the offer, assigning, as his only reason, that the sum was not enough; and that on the thirty-first of October, 1874, she again tendered to him \$500, by the hands of her authorized agents, C. V. Bergen and George W. Humphries, which was also rejected. Both of these tenders are proved by the parties who are stated to have witnessed or participated in them. Not only were the tenders legal, but the amounts were amply sufficient for any sums due when they were respectively made. It requires no very serious analysis of the dates of the purchases and payments, as claimed by the defendant in his answer, to prove this. Less than \$200 were due him in May, 1873, when he refused \$350 as insufficient; and if the \$500 tendered in October, 1874, should be applied to lawful purchases and payments after May 5, 1873, such sum was

largely in excess of any amount that the defendant had expended for taxes and assessments paid since that date. There must, therefore, be a decree for the complainant, with costs, and a reference to a master for an account.

Unless it can be satisfactorily shown that the defendant is pecuniarily responsible for the rents that are accruing, I will, on the application of the complainant, appoint a receiver to collect them, and to take charge of the property during the accounting.

I infer from the testimony of the defendant himself that he has allowed the premises to get sadly out of repair. It is rarely that a case falls under the observation of the court where the conduct of the defendant has been more unconscionable. Since he became the purchaser his whole thought, evidently, has been to perpetuate his control. He has allowed the taxes for which he was responsible to remain unpaid from year to year, and has caused the property to be sold and resold for their payment, and in all cases has become the purchaser for longer or shorter periods of time, as if by such methods he could increase the sums to be paid for the redemption of the premises. He must be held accountable for the rents and income since the tender, if not for what the property would have produced with reasonable and proper diligence. The order of reference should direct the master to ascertain and report, not only the amounts and dates of payments of the defendant on account of the property, but also the particular years for the non-payment of the taxes of which the real estate was sold; and, further, the amounts and dates and receipts of rents from the respective lots.

UNITED STATES *ex rel.* SOUTHERN EXPRESS CO. v. MEMPHIS &
LITTLE ROCK R. Co. and others.

(Circuit Court, W. D. Tennessee. March 3, 1881.)

1. CONTEMPT OF COURT—BREACH OF INJUNCTION—FOREIGN CORPORATION—FINE.

Under the statutes of the United States a corporation may be fined for a breach of an injunction, and the court is not limited to proceedings against the individual directors or other responsible agents. And where a foreign corporation is doing business in another state, in which the courts of the United States acquire jurisdiction over it to issue an injunction, it is proper to punish a contempt of the court's authority by a fine, as well against the corporation itself as the subordinate agents found within the jurisdiction.

In Equity.

Rule to show cause why they should not be punished for contempt of court, by the violation of an injunction, was issued against the Memphis & Little Rock Railroad Company, an Arkansas corporation, doing business in Tennessee, and certain designated officials and agents, who, being served with the rule, all appeared and answered, including the corporation. It appeared that on a bill filed by the Southern Express Company an injunction was granted, among other things, forbidding discriminations against the plaintiff, and directing not more than a certain rate should be charged for express freight between Memphis and Little Rock. The injunction was properly served, but the railroad company continued to charge a greater rate than it specified, and refused the plaintiff's freight without payment of the overcharges. There was much proof taken, but the facts on which the court acted were sufficiently stated in delivering judgment. The defendant company moved at the same time to dissolve the injunction, among other causes, for the reason that the published act of the Arkansas legislature, on which the court acted in determining the rates, was never, in fact, passed, and after the contempt proceedings were ended the injunction was modified in accordance with that fact. There was shown by the evidence of the telegrams and orders issued by the company,

or some one acting for it, a vacillation between a direction to obey the injunction and one to disobey it outright; but the general result was to charge the rate fixed by the injunction, but to increase it by adding charges for ferriage over the river at Memphis, and bridge tolls over the river at Little Rock, which extra charges had never before been made separately to the plaintiff or other shippers, but were included in the tariff rates.

F. E. Whitfield, T. B. Turley, and Geo. Gillham, for relators.

B. C. Brown, R. J. Morgan, and W. G. Weatherford, for respondents.

HAMMOND, D. J., (*orally.*) There is no doubt whatever on the proof that this injunction has been violated, and that deliberately, either because it was supposed this court had no jurisdiction, which had been ruled against the defendant corporation, or because it was supposed that it could be circumvented by offering a pretext for the misconstruction of its plain language. Advice of counsel is no excuse, and, unfortunately, we have not a hold now on the individuals who instigated the violation, nor any definite proof as to the particular persons responsible for the orders and telegrams under the authority of which the breaches were committed by the subordinate agents of the company. I appreciate the position these agents occupy, and the dilemma in which they were placed. On the one hand they had the unambiguous and plain command of this court, and on the other that of their superiors, to whom, generally, obedience is a duty, and, perhaps, always a necessity, when considered in relation to the probable loss of their employment, for disobedience. Notwithstanding this, there can be no question that at all hazards of such losses it was their duty to obey the injunction. I should be satisfied with a reprimand, and the penalty of costs, if it did not appear in the evidence that these young men, in the language of the telegrams and affidavits, "were not afraid" to "take the responsibility" of violating this injunction, and, but for their disobedience of it, its violation by the others would have been impossible. The route-agent

and messenger are, therefore, fined \$50 each, and will stand committed to the jail of Shelby county till the fine and costs are paid. The general manager shows satisfactorily, I am glad to say, that he was in Texas, and neither signed nor authorized the telegrams which directed disobedience of the injunction, and which some parties, unknown to this court, sent in his name, without his knowledge or consent. He advised and counselled obedience when first he had knowledge of the injunction. He is discharged. So the other agents responding to the rule to show cause may be discharged. They only refused to act at the request of the relators in giving orders to the two agents already fined, who were willing to take the responsibility. It is not necessary to determine whether they had superior authority which would have been recognized by the guilty respondents, because they simply did nothing and declined to interfere.

As to the corporation itself, I am satisfied it may be punished under our statutes by a fine, and that the court is not confined to the remedy against the directors individually, or such other responsible persons as may be discovered as the authors of the telegrams and orders. In England it is or was not usual to punish a contempt by a fine, even in the case of natural persons. They were "to stand committed to Whitecross-street prison." The order gave specific directions for purging the contempt where the case required, and the imprisonment continued until they were complied with. It was sometimes required that this imprisonment should last until a money award, in the nature of compensation, was paid to the party injured; but I do not find, in the limited investigation I have been able to make during these proceedings, that a fine was ever imposed in the nature of a penalty to the crown, though it may be so. Obedience to an injunction against privileged persons and corporations was sometimes enforced by sequestration, which placed the property of the contemnor in custody until obedience was given. 2 Dan'l, Ch. Pr. (5th Ed.) 1685, 1687; 2 Bish. Cr. L. (6th Ed.) §§ 241, 273; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42, and cases cited by these authorities. Our Revised Stat-

utes, taken from the act of March 2, 1831, c. 99, and prior acts of congress, have prescribed the mode of punishment, and directed that it shall be by fine or imprisonment, and this operates as a negation of all other modes of punishment. Contempts may also be punished by information or indictment, in which case the punishment is limited to a fine of not more than \$500, or imprisonment not more than three months. Rev. St. §§ 725, 5399; 4 St. 488; *Ex parte Robinson*, 19 Wall. 505; 2 Bish. Cr. L. § 267.

It is constant practice to punish corporations where, they are amenable to the criminal law, by fine. Mr. Bishop says that although "a corporation cannot be hung, there is no reason why it may not be fined for the same act which would subject an individual to the gallows." 1 Bish. Cr. L. (6th Ed.) § 423. It is usual, in contempt proceedings, to arraign the individual agents, and that is the better way, perhaps, where it can be done and is effectual; but, although I have found no case imposing a fine on the corporation itself, and diligent counsel say they find none, I do not hesitate to hold that it can be done, and should be in proper cases. Here the headquarters are in an adjoining state, where the parties—whoever they were—directing a violation of this injunction reside, and I am not satisfied that our authority is vindicated by the fines imposed for their individual offence upon the comparatively innocent young men who are the subordinate agents in the execution of orders for which the corporation itself is fairly responsible. It is here by service of notice in a manner that would be amply sufficient to give this court jurisdiction to render a money decree in a civil suit, and, moreover, have appeared formally and answered the rule. The corporation itself is therefore fined the sum of \$250, and the costs of this proceeding.

I have taken into consideration the mitigating circumstance that the injunction imposed a restriction as to rates which was not authorized by law; the published act of assembly of the state of Arkansas, upon the authority of which the injunction was granted, having turned out to be not a valid law, it not having been in fact enacted in both houses of the

assembly, as appears in proof. But for that circumstance I should impose a heavier fine. I do not find in the case that good will and fair intention which in cases of wrongful injunctions sometimes reduce the offence so that the court is satisfied with the penalty of costs. The case requires more than this to sustain the dignity of the court against wilful breaches of its authority.

So ordered.

Cross and others v. MORGAN and others.

(Circuit Court, D. New Jersey. March 22, 1881.)

1. EQUITY PRACTICE—AMENDMENT—ANSWER.

Leave to amend an answer, in a suit to foreclose a mortgage, by the insertion of an additional fact, refused, where such fact was known to the defendant at the time the answer was filed.—[Ed.]

On Bill to Foreclose, etc.

NIXON, D. J. This is an application to the court to allow one of the defendants to amend his answer.

The bill was filed to foreclose a mortgage executed originally by one Joseph Cross, Jr., to Joseph Cross, to secure the payment of \$3,500. After the due execution of the encumbrance, the mortgaged premises were sold to one James R. English, who assumed the payment of the mortgage as a part of the consideration money. English, in turn, conveyed the property to Anthony Q. Keasbey and Edward A. S. Man, as joint tenants, who also assumed the payment of the same. Keasbey and Man, holding the property as trustees for certain creditors, transferred it to J. Pierpont Morgan, who, in the deed of conveyance to him, also assumed the payment of the mortgage as a part of the consideration of the transfer. The executors of the mortgagee filed a bill against the said Morgan and others, praying therein not only for a decree of foreclosure, but also that the said Keasby, Man, and Morgan might be respectively decreed to pay the deficiency, if the

v.6,no.3—16

proceeds of sale of the mortgaged premises should not be sufficient to pay the amount due on the mortgage, with interest and costs.

In answering the bill, the defendant Morgan admits that the premises were conveyed to him by Keasbey and Man, and that the deed contained a clause to the effect that he assumed and agreed to pay off and discharge the mortgage, as a part of the consideration thereof; but alleges that the said land had been conveyed to Keasbey and Man in exchange for other land of equal value by them held as trustees under a certain agreement, dated March 14, 1873, entered into by one William J. Pollock, as party of the first part, Drexel, Morgan & Co., party of the second part, Addison Brown, party of the third part, Morton, Bliss & Co., party of the fourth part, and A. Q. Keasbey and Edward A. S. Man, party of the fifth part, wherein it was, among other things, agreed that the title to certain premises should be taken by Keasbey and Man, as trustees, to hold the same upon trust, to sell and dispose thereof in a certain manner and upon certain terms in the said agreement provided for, and to distribute the proceeds of the sale to certain persons in that behalf, in the said agreement mentioned, with power and authority to the trustees to cause the premises to be laid out in streets and lots, and to make the necessary exchanges of land to effect the same; that the before-mentioned conveyance by English to Keasbey and Man was received by them as such trustees, and not otherwise; and in the performance on their part of a previous agreement, before made by the said Pollock, as the owner of certain other land, with the said English, to exchange the same for the premises thereby conveyed; and the said premises became and were part of the fund so held in trust by Keasbey and Man; and that the said Keasbey and Man had no right, power, or authority, as such trustees, to make or give any promise, covenant, or agreement whereby they, as such trustees, assumed the payment of any mortgage upon said land, or charged the fund in their hands, as trustees, with any such burden.

The answer then alleges that the sale provided for in the

agreement was had, and that under the provisions thereof to the effect that any party thereto might be at liberty to bid and purchase at such sale, the said Drexel, Morgan & Co. purchased thereat, among others, the mortgaged premises described in the bill of complaint; that the same were sold free and clear of all encumbrances and liens; that in purchasing, the said Drexel, Morgan & Co. were acting only for the purpose of protecting themselves against severe loss upon their debt against Pollock; and that, thereafter, he, the defendant, being a member of the firm of Drexel, Morgan & Co., received the deed above mentioned in his own name, and now holds the same, as trustee, for said firm, *"and that upon such conveyance to defendant, the said Keasbey and Man claimed that they were entitled to such covenant of assumption of the said mortgage as such trustees, and that the same was given and intended only as indemnity to them as such."*

The amendment asked for is to strike out all of the last clause of the above sentence after the word "firm," and to insert in lieu thereof the following: "And that upon such conveyance to defendant the said Keasbey and Man, claiming that they were entitled to such covenant of assumption of the aforesaid mortgage as and for an indemnity to them as such trustees, inserted the same in said conveyance for that purpose, and not otherwise, without the knowledge, consent, or privity of this defendant; and that defendant had no knowledge or information of the fact that such covenant of assumption was so inserted therein, or that such claim was so made by said Keasbey and Man until after the commencement of this suit."

Courts of equity have great reluctance to listen to applications of this kind. After a defendant has deliberately sworn to his answer, it has always been reckoned a dangerous practice to allow him to amend by putting in a new and different statement of facts. This is especially the case after the vital character of the change proposed has been discovered during the progress of taking the testimony in the cause.

Enough has been revealed by the affidavits put in, in support of the application to amend, to render it quite sure that

the defendant Morgan had very little personal knowledge of the transactions out of which the present controversy grew. He left the details of the proceedings and negotiations to his legal advisers. Reasonable allowance should, therefore, be made for his ignorance of particular facts. But it cannot be claimed that, when his answer was sworn to, he did not know the fact, which was then not stated, and which he now wants inserted as a supplement to his defence. In his answer he alleges that Keasbey and Man claimed they were entitled to the covenant of assumption of payment of the mortgage, as his trustees, and that the same was given and intended only as indemnity to them as such. In the amendment it is proposed to insert the additional fact that such covenant was put in without the knowledge, consent, or privity of the defendant. Daniells, in his Ch. Pl. & Pr. 799, states broadly that the court never permits amendments of this nature where the application has been made on the ground that the defendant, at the time he filed his answer, was acting under a mistake in point of law. Nor is he allowed to contradict the statements of his first answer. *Livesey v. Wilson*, 1 Ves. & Bea. 149; *Vanderveer v. Reading*, 1 Stick. 446; *Greenwood v. Atkinson*, 4 Sim. 61. Nor do we find any well-considered case, authorizing a supplemental answer, which embraces any fact that was known to the defendant at the time his answer was sworn to, except in a few instances, where the court considered the reasons satisfactory which were given for their original omission. *Smith v. Babcock*, 3 Sum. 583; *Suydam v. Truesdale*, 6 McLean, 459; *Bowen v. Cross*, 4 John. Ch. 376; *Huffman v. Hummer*, 2 C. E. G. 272. And here appears to be the difficulty with the defendant's case. He has not obtained his knowledge of the additional fact, which he wishes to put in, since his answer was filed. He knew it then, if he did not when the suit was commenced; and if it be a material fact it should have been then stated.

The leading case in this country on the subject of amendments to an answer is *Smith v. Babcock*, *supra*, in which the learned judge (Story) says: "Considering the solemnity of answers, I should be sorry to see any practice introduced

which should in any, the slightest, degree encourage negligence, indifference, or inattention to the duties imposed by law upon parties who are called upon to make statements under oath. And it seems to me that, before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected or the facts to be added are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence, and that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer was put in and sworn to."

In *Huffman v. Hummer, supra*, the late Chancellor Green, in denying a motion to amend, said: "It is clear that the mistake in the case has not been ascertained, and that no new fact has come to the knowledge of the defendant since the answer was sworn to. Every fact now within the knowledge of the defendant was known to him at the time of putting in the answer, and it would tend to the encouragement of gross negligence to permit a defendant to remould an answer, to the truth of which he has sworn, with a full knowledge of all the facts. * * * If it was a mere mistake of the law, it is clear that the answer cannot be amended on that ground."

In *Suydam v. Truesdale, supra*, the court refused, as a matter of course, leave to file a supplemental answer to a bill of foreclosure, because it appeared that the fact which the defendants wanted to introduce was known to them at the time of the original answer, and that it had not been omitted by their mistake.

Without multiplying authorities, which seem to be all in the same direction, the application to amend in this case must be denied.

COLLIARD v. DELAWARE, LACKAWANNA & WESTERN R. Co.

(Circuit Court, D. New Jersey. March 22, 1881.)

1. JOINT TRESPASS—SEVERAL SUITS—UNSATISFIED JUDGMENT.

An unsatisfied judgment against one joint trespasser is no bar to a suit against another for the same trespass.

Lovejoy v. Murray, 3 Wall. 1.—[Ed.]

On Motion to Strike Out Pleas, etc.

NIXON, D. J. This is an application to strike out the second and third pleas filed by the defendant corporation to an amended declaration.

The suit was originally brought in the supreme court of the state of New Jersey by the plaintiff against this defendant and one John McAndrews, as joint trespassers. The defendants severed in their pleadings, and after issue joined, and before trial, the Delaware, Lackawanna & Western Railroad Company, availing themselves of the provisions of the acts of congress on the subject, removed the issues which they had raised into this court for trial. The cause as to the other defendant, McAndrews, remained in the state court. It was there tried, and judgment was obtained against him in favor of the plaintiff for upwards of \$2,000. After the removal here the plaintiff applied for and obtained leave to amend his declaration, and the defendant company pleaded thereto: (1) The general issue, and (2) and (3) that the alleged grievances were committed by the defendant, if committed at all, jointly with one John McAndrews; that before the filing of the amended declaration and of said pleas, to-wit, on the twenty-sixth day of February, A. D. 1878, the plaintiff had recovered a judgment against the said McAndrews in this suit, then pending in the supreme court of the state of New Jersey, for \$2,199.08, for damages which he had sustained by reason of the committing of the identical trespasses in the said declaration mentioned; that the court of errors and appeals of the state of New Jersey had affirmed the said judgment on appeal, and that the same was still remaining in full force and effect.

The motion to strike out these pleas is based upon the proposition that, even if true, the facts stated are no defence to the action; that obtaining a judgment against one joint trespasser, without any subsequent satisfaction thereof, is no bar to the recovery of another judgment against another joint trespasser for the same grievances.

The conflict of authority upon this question, both in the courts of Great Britain and of the several states of the United States, is quite remarkable. But since the case of *Lovejoy v. Murray*, 3 Wall. 1, there has been no doubt respecting the opinion of the supreme court of the United States. After the most faithful and exhausting argument by counsel, and a careful consideration by the court, the conclusion was unanimously reached that a judgment against one joint trespasser is no bar to a suit against another for the same trespass; and that nothing short of full satisfaction, or that which the law must consider such, can make each judgment a bar.

This would seem to cover the case. As the pleas do not allege satisfaction of the judgment, the motion to strike out must prevail, with costs.

UNITED STATES v. FOSTER and others.

(Circuit Court, E. D. Virginia. February 19, 1881.)

1. ELECTION OFFICERS—REV. ST. § 5515.

In order to convict an officer of an election, in which a representative in congress is voted for, of neglecting or refusing to perform any duty in regard to such election, under section 5515 of the Revised Statutes, it must be shown that such neglect or refusal was coupled with some wrongful purpose, motive, or intent.

2. AUDITOR'S RECEIPT—CODE OF VIRGINIA, c. 43, § 7.

Section 7 of chapter 43 of the Code of Virginia, defining how money shall be paid into the state treasury, provides, among other things, that after the amount paid shall have been lodged in a bank, and a certificate of the fact delivered to the treasurer, "the treasurer shall give a receipt for the sum so paid; and, upon the same being delivered to the auditor, * * * he shall grant a receipt therefor." *Held*, under this section, that a receipt signed by the auditor's clerk was sufficient.

CAPITATION TAX—PAYMENT BY ANOTHER—CONSTITUTION OF VIRGINIA, ART. 3, § 1—PENAL CODE OF VIRGINIA, c. 8, § 26.

An amendment to the constitution of the state of Virginia (article 3, § 1) provided that in order to entitle a citizen to vote "he shall have paid to the state, before the day of election, the capitation tax required by law for the preceding year;" and the Penal Code (chapter 8, § 26) provided that "if any person, directly or indirectly, give to a voter in any election any money, goods, or chattels, or pay his capitation tax, under an agreement, expressed or implied, that such voter shall give his vote for a particular candidate, such person shall be punished by a fine of not less than \$20 nor more than \$100; and the voter receiving such money, goods, or chattels, or having his capitation tax paid in pursuance of such agreement, shall be punished in like manner with the person giving the same." *Held*, that the payment of such capitation tax by another qualified the citizen to vote, whether the Penal Code had been violated or not.—[Ed.]

The indictment set out that the defendants were judges of election for the third ward precinct of the town of Manchester, at an election held on the second of November, 1880, for choosing, amongst other officers, a representative in Congress from the third district of Virginia, and charged that they did, at said precinct, in said election, "unlawfully neglect and refuse to perform a certain duty required of them by the laws of the United States and of the state of Virginia," in this: that they refused to receive, give effect to, etc., the votes of John Burton and 12 other persons who are particularly named in the indictment. By an amendment of the constitution of Virginia in the first section of its third article, adopted in the year 1877, it was provided that besides the qualifications before required to entitle a citizen to vote, "he shall have paid to the state, before the day of election, the capitation tax required by law for the preceding year." By the seventh section of chapter 43 of the Code of Virginia, defining how money shall be paid into the state treasury, it is provided, among other things, that after the amount paid shall have been lodged in a bank, and a certificate of the fact delivered to the treasurer, "the treasurer shall give a receipt for the sum so paid; and upon the same being delivered to the auditor * * * he shall grant a receipt therefor." And the Penal Code of Virginia, adopted March 14, 1878, provides in section 26 of chapter 8 that—

"If any person, directly or indirectly, give to a voter in any election any money, goods, or chattels, or pay his capitation tax, under an agreement, expressed or implied, that such voter shall give his vote for a particular candidate, such person shall be punished by fine not less than \$20, nor more than \$100. And the voter receiving such money, goods, or chattels, or having his capitation tax paid in pursuance of such agreement, shall be punished in like manner with the person giving the same." But there is no law, state or federal, invalidating the vote of the person whose tax has been paid.

It was shown in evidence that the several persons named in the indictment as having been rejected as voters were in all other respects qualified voters, and that in respect to the payment of the capitation tax they had exhibited to the defendants, as judges of election, receipts precisely alike, except as to the name of the tax payer, and which were of the following tenor:

"COMMONWEALTH OF VIRGINIA,

"OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,

"RICHMOND, VA., October 30, 1880.

"\$1.05.

"Received of John Burton the receipt of the treasurer of the commonwealth for \$1.05, on account of capitation and personal-property taxes returned delinquent for the non-payment thereof by the treasurer of Manchester city for the year 1879.

"G. W. DUESBERRY, Jr., Clerk."

It was also shown in evidence that the defendants, judges of election, based their refusal to receive the votes of the holders of these receipts, first upon the ground that they did not know that G. W. Duesberry, Jr., was a clerk of the auditor of Virginia, and did not know from his receipts that the taxes had been paid, and that thereupon a witness at once made affidavit that he knew that Duesberry was such clerk, and knew, moreover, of his own knowledge, that these particular taxes had been paid. It was proved that after several hours of the election day had passed the judges saw a written opin-

ion, signed by the judge of the corporation court of Manchester, to the effect that such receipts were not genuine unless signed by the state auditor, John E. Massey, himself. It was also proved that the judges of election rejected the votes of the persons in question on the additional ground that the taxes had not been paid by the persons offering to vote, but had been paid by some one for them, and that although the taxes were paid, yet, the payment being made contrary to the law of the state quoted above, the votes could not be received.

No proof was adduced by the prosecution, other than the foregoing, to show a wrongful *animus* or intent on the part of the defendants in rejecting the votes of the 13 persons named in the indictment.

Counsel on either side submitted the case without argument to the jury, with the understanding that the court would instruct the jury on the points of law involved, which the court did orally, but in substance as follows:

L. L. Lewis, U. S. Att'y, for prosecution.

George D. Wise and A. M. Keiley, for defendants.

HUGHES, D. J., (*charging jury*.) This case is important as affording an opportunity for a judicial construction of the election laws upon the somewhat difficult questions arising on the evidence before us. This is the only manner in which a court of justice can concern itself with elections. Their office is to try and pass upon controversies between parties; either between the government and accused persons in criminal causes, or between one person and another in civil causes. A court of justice can regularly have to do only with causes *inter partes*. All its forms and proceedings lead to an issue of fact or law, or both, *between litigants*; and its function consists in deciding such issues. As incidental to this function it may grant injunctions and restraining orders for protecting property in controversy or the rights of litigants; and it may issue writs of *habeas corpus* as a means of ascertaining whether a person in confinement is lawfully confined upon a criminal charge. But these powers and processes are only incidental to its chief and principal office of

determining controversies *inter partes*. A court cannot, on or before an election day, send out its process to all whom it may concern prohibiting judges of election generally or particularly from doing this or that, or directing them to give a law this or that construction. Judges of election are not part of the judiciary establishment, and are not amenable to instructions from courts of justice in the exercise of their high duties. Whether regarded as servants of the legislature or as a branch of the executive, judges of election are wholly independent of courts of justice in the power freely to perform their duty in the manner dictated by their own consciences, and in conformity with their oaths and the laws of the state and Union. If courts attempt interference with them in the act of discharging their duty at the polls, their action is extrajudicial, is *coram non judice*, is without authority of law, and is not binding upon judges of election. It is only when a case like the one at bar comes in a regular manner before a court of justice, and election laws are thus brought under judicial construction, that a court of justice can act in an authoritative manner; and it is only then that its construction of election laws enters into the body of the law of the land, and as such becomes binding upon the conscience of judges of election in the same manner with the statute law itself.

The principal question in the present case is whether the men who offered to vote as named in the indictment were entitled to vote; for, if they had a right to vote, and their votes were rejected, then these judges of election, the defendants, in rejecting their votes, did "*neglect and refuse to perform their duty*" in the premises, and are technically guilty of the charge set out against them in the indictment. I say they are technically guilty by the mere act of "neglecting and refusing" to receive the votes; for the law on which the indictment is based (section 5515 of the Revised Statutes of the United States) makes the naked act of so "*neglecting and refusing*" a crime, and uses no qualifying term, such as "corruptly," or "wilfully," or "with wrongful intent," as necessary to be proved, besides the naked act. But, although such

is the wording of the statute, I instruct **you** that the law disdains to punish a man who innocently or ignorantly or in good faith commits an unlawful act, and therefore this indictment, though it need not necessarily have done so, charges that the *neglect and refusal* to perform their duty by these defendants was "unlawful." In order to a conviction in this case I instruct you, therefore, that the prosecution must not only have proved a neglect and refusal by these defendants to perform the duty required of them by law, but that the neglect and refusal were coupled with some wrongful purpose, motive, or intention on their part.

The principal question in the present case, I repeat, is whether the 13 persons who offered to vote on the auditor's receipts, a sample of which is given above, were entitled to vote. It is conceded that in all other respects these persons (who were all colored) were qualified voters. It is also conceded that these receipts are genuine documents; that is to say, they are veritably what they purport to be,—receipts issuing from the "office of the auditor of public accounts" of the "commonwealth of Virginia," at Richmond. Their genuineness was not disputed, and could not have been disputed in any part of the territory of Virginia. The only point made by the judges of election was that the receipt was signed by a clerk of the auditor's office, and not by the auditor himself. They held that section 7 of chapter 43 of the Code of Virginia, in providing that on the treasurer's receipt for money paid into bank being delivered to the auditor the latter officer shall "grant a receipt therefor," required that this receipt for a receipt should be signed by the auditor himself.

When this question was submitted to me by the grand jury which found this indictment, I answered that the genuineness of this receipt as a document issuing from the auditor's office, not being disputed, its sufficiency must be presumed until the contrary is shown. This I did, on the well-known maxim of law, *omnia præsumunter rite et solemniter esse acta*; which means that all official acts of officers done under their official oaths, in the line of their official duty, must be presumed to have been rightly and legally done, in due form,

until the contrary is shown. That such acts were rightly done must be taken for granted, from the necessity of the case, else infinite inconvenience, obstruction, and confusion would take place, and the affairs of society could not go on. I also asked the grand jury to observe that the language of the Code in respect to the auditor was not that he shall *sign and grant* a receipt for the treasurer's receipt, but simply that he shall grant such receipt. The law seemed to contemplate that the pressure of labor upon the auditor's office might be so great at times as to render it inconvenient, and sometimes impossible, for him to sign all receipts with his own sign-manual, and in that view seems to have employed the word "grant" instead of the words "sign and grant." Besides, a mere receipt for a receipt is not so important an instrument but that the duty of signing it may very safely be delegated to a clerk.

Another objection of the defendants to receiving the votes of the persons holding these receipts was founded on the clause of the recent amendment to the state constitution declaring that the citizen, in order to be entitled to vote, shall, among other things, "have paid to the state, before the day of election, the capitation tax required by law for the preceding year;" and evidence was offered to show that the judges surmised, inferred, or supposed that these persons had not paid their taxes in person, but that some one else had paid them in their stead; and this was supplemented with still other evidence, proving it to have been the opinion of these defendants that taxes so paid did not remove the disqualification from the persons who were offering to vote.

My instruction to you, gentlemen, on this whole set of opinions set up for these defendants, is that each of the three grounds of objection to the votes in question is insufficient. The clause in the constitution is one of that class of clauses which all legal and political maxims of construction require to be liberally interpreted and applied. If a citizen's tax has been paid, and he is otherwise qualified, then, by

that fact, he becomes a qualified voter. If it is paid for him by another, not in the way of a bribe, and without any understanding, express or implied, that he is to vote for a particular candidate, then the payment is legal and in every way proper. If it is paid as a bribe, or with an understanding, express or implied, that he is to vote for a particular candidate, then he commits an offence punishable by a \$20 fine, for which he may be prosecuted; and that is the only penalty which the law visits upon the act: it does not invalidate the vote or re-impose the disqualification of the voter.

And so, if the taxes of these men had been paid, whether in violation of law or not in violation of law, the right to vote attached to them on such payment of the tax, and their votes should of right have been received. Judges of election have nothing to do with penal laws. They are not at liberty to suspect, as to a citizen who pleads that his tax has been paid, that another person has paid it for him; to try him summarily under a penal statute, which condemns him only in a penalty of a \$20 fine, and to convict and sentence him to the different penalty of being disqualified from voting; acting in the space of five minutes as prosecutor, judge, and jury. This would be a revival of star-chamber methods, and is repugnant to all our American ideas of free government and civil liberty.

I therefore instruct you, gentlemen, that these receipts were sufficient evidence of the payment of the taxes of the men named in them; that these men became thereby qualified to vote on the receipts, whether the law of 1878 had been violated or not; and that, even if the law had in fact been violated, such violation only subjected the parties to the offence to a fine of \$20, triable and punishable by a court of justice, and not to disfranchisement by these judges of election; for the violation did not re-impose the disqualification which had existed before the tax had been paid.

I have thus disposed of the principal question in this case, to-wit, whether the persons named in the indictment as having offered to vote were qualified voters. They *were* qualified

voters under the law of the land, and in rejecting their votes the defendants did "neglect and refuse to perform a duty" required of them by the laws of Virginia and the United States, and they are technically guilty of the offence charged in the indictment. It only remains for me to say something on the question whether the defendants neglected and refused to do their duty in the premises with wrongful motive or intent.

You can only judge of intention by words and acts. Men were not made with windows in their breasts through which we might read the motives of their conduct. We can discover intentions only from words and acts. It is shown that the judges acted upon the opinion in writing of the judge of the corporation court of Manchester, an officer upon whom the laws of the state devolve the ministerial, but not judicial, duty of appointing judges of election. It is certainly natural for conscientious men to consult the opinions of lawyers in whose learning and judgment they have confidence. But judges of election ought as certainly to be cautious how they accept opinions not given under the sanction of an oath or of official responsibility, as the basis of their action in so grave a matter as the disfranchisement of citizens from the privilege of voting. It is not a part of the duty devolved by law upon judges of courts of justice to give opinions on questions of law to other than grand juries, or persons or bodies having like relations to their courts. If given, such opinions are not official, have not the sanction of an official oath, and carry no other authority than the moral weight of the authors of them. The defendants in this case, as judges of election, would have had a right to call upon the attorney general of the state or the commonwealth's attorney of their corporation for his opinion on questions arising before them; and such an opinion would have come to them under the sanction of the official oath; but even with such sanction it would not have been binding upon these judges of election. They are officers who must act upon their oaths, their consciences, and their own responsibility to the law. If they "neglect and refuse to perform their duty" with wrongful intent, it is a

poor and useless shift to attempt to shelter themselves behind the opinions, whether official or unofficial, of lawyers who advised them to do so.

Still, the fact that these defendants did seek and accept legal advice is an indication of good faith, and is a fact proper to be considered, even if the advice which they took mislead them into the commission of a penal offence.

With these remarks I will leave the jury to deal themselves with the question whether the rejection of the votes under consideration was done in good faith or with wrongful intent, and will only remark that if that question is left in doubt by the evidence, the defendants are entitled to the benefit of the doubt.

IN RE CAMILLE.

(*Circuit Court, D. Oregon. November 2, 1880.*)

1. NATURALIZATION—WHITE PERSON.

A person of half white and half Indian blood is not a "white person," within the meaning of this phrase as used in the naturalization laws, and therefore he is not entitled to be admitted to citizenship thereunder.

Petition to be Admitted to Citizenship.

DEADY, D. J. Frank Camille petitions to be admitted to become a citizen of the United States, under section 2167 of the Revised Statutes, as an alien who has resided in the United States the three years next preceding his arriving at the age of 21 years, and without having made the declaration of his intentions in that respect required in the first condition of section 2165 of the Revised Statutes.

From the evidence it appears that the applicant was born at Kamloops, in British Columbia, in 1847, and at the age of 17 came to Oregon, where he has ever since resided, and that he is otherwise entitled to admission, if he is a "white person," within the meaning of that phrase as used in section 2167 of the Revised Statutes, as amended by the act of Feb-

ruary 18, 1875, (18 St. 318.) His father was a white Canadian, and his mother an Indian woman of British Columbia, and he is, therefore, of half Indian blood.

In re Ah Yup, 5 Sawy. 155, it was held by Mr. Justice Sawyer that the words "white person," as used in the naturalization laws, mean a person of the Caucasian race, and do not include one who belongs to the Mongolian race. In the course of the opinion he says: "Words in a statute, other than technical terms, should be taken in their ordinary sense. The words 'white person,' as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this country, at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race."

From the same reasons it appears that the words "white person" do not, and were not intended to, include the red race of America.

Chancellor Kent, in considering this subject, (2 Com. 72,) says that "it may well be doubted" whether "the copper-colored natives of America, or the yellow or tawney races of the Asiatic," "are 'white persons' within the purview of the law."

In all classifications of mankind hitherto, color has been a controlling circumstance, and for that reason Indians have never, ethnologically, been considered white persons, or included in any such designation.

From the first our naturalization laws only applied to the people who had settled the country—the Europeans or white race—and so they remained until in 1870, (16 Stat. 256; § 2169 Rev. St.,) when, under the pro-negro feeling, generated and inflamed by the war with the southern states, and its political consequences, congress was driven at once to the other
v.6,no.3—17

extreme, and opened the door, not only to persons of African descent, but to all those "of African nativity"—thereby proffering the boon of American citizenship to the comparatively savage and strange inhabitants of the "dark continent," while withholding it from the intermediate and much-better-qualified red and yellow races.

However, there is this to be said in excuse for this seeming inconsistency: the negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them.

The conclusion being that an Indian is not a "white person" within the purview of the naturalization laws, the question arises, what is the *status* in this respect of the petitioner, who is a person of one-half Indian blood? In Louisiana, if the proportion of African blood did not exceed one-eighth, the person was deemed white; and this was the rule in the colonial *code noir* of France, and approved in Carolina. 2 Kent. 72, note b.

In Ohio it has been held that a person nearer white than black or red was a white person, within the provision in the state constitution of 1802, limiting the privilege of voting to the "white male inhabitants," etc.; but that where the colored blood was equal to or preponderated over the white blood, the person was not white.

In *Jeffries v. Ankeny*, 11 Ohio, 372, it was held that the offspring of a white man and a half-breed Indian woman was a voter; "that all nearer white than black, or of the grade between the mulattoes and the whites, were entitled to enjoy every political and social privilege of the white citizen." See *Gray v. The State*, 4 Ohio, 353; *Thacker v. Hawk*, 11 Ohio, 377; *Lane v. Baker*, 12 Ohio, 237.

Upon these authorities, and none other have come under my observation, the petitioner is not entitled to be considered a white man. As a matter of fact, he is as much an Indian

as a white person, and might be classed with the one race as properly as the other. Strictly speaking, he belongs to neither.

The power to say when and under what circumstances aliens may become American citizens belongs to congress. Citizenship is a privilege which no one has a right to demand; and in construing the acts of congress upon the subject of naturalization, the courts ought not to go beyond what is plainly written.

The petitioner is not a "white person" in fact, nor can he be so considered upon any reasonable construction of the statute, or within any rule that has ever been promulgated on the subject.

The application is denied.

CUTTING v. CUTTING and others.

(Circuit Court, D. Oregon. March 29, 1881.)

1. GRANT TO CHILDREN UNDER SECTION 4 OF THE DONATION ACT.

Upon the death of a married settler, under section 4 of the donation act, (9 St. 497,) before receiving a patent for the donation, and without having exercised the power to sell or devise the same, his interest therein is granted to his widow and children or heirs, and they take as the direct donees of the United States, and not by descent from such settler; and therefore the property cannot be sold by the administrator to pay his debts.

2. CHILDREN.

The word "children," as used in section 4 of the donation act, includes grandchildren; so that the children of a deceased child are entitled by right of representation to a child's part in the donation occupied thereunder by their grandparents.

3. CHILDREN OR HEIRS.

The grant of the interest of a deceased settler in the donation to his "children or heirs," as provided in section 4 of the donation act, takes effect in favor of the children first, and to the heirs only in default of children.

4. HEIRS OF A DECEASED SETTLER.

The heirs of a deceased settler, under section 4, are such persons as the local law—the law of Oregon—makes his heirs.

5. PATENT TO THE HEIRS OF A DECEASED SETTLER.

A patent to the heirs of a deceased settler, under said section 4, presupposes that it was found in the land department that such settlers left no children, and the contrary cannot be shown to affect the patent in an action at law.

Action to Recover Real Property.

J. H. Reed and Hugh T. Bingham, for plaintiff.

W. Cary Johnson, for defendants.

DEADY, D. J. This action is brought by the plaintiff, a citizen of California, against the defendants, David Cutting, Orin Cutting, and G. J. Trullinger, citizens of Oregon, to recover the possession of an undivided one-fifth of the north half of the donation of Charles Cutting and Abigail, his wife, the same being claims numbered 47 and 52, and parts of sections 5 and 6 in township 4 S., range 2 E., and sections 1 and 2 in township 5 S., of the same range, and situated in the county of Clackamas.

The defendants David and Orin Cutting deny the allegations of the complaint, and allege that they are the owners in fee of the premises, except 116 acres thereof. The defendant Trullinger makes the like denials, and alleges that he is such owner of the said 116 acres.

By the stipulation of the parties the case is submitted to the court upon an agreed state of facts, which is to stand and be taken for the special verdict of a jury. From this it appears that Charles Cutting settled upon the claims aforesaid on April 11, 1849, and on May 3, 1864, duly proved his residence and cultivation thereon, as provided in the donation act of September 27, 1850, (9 St. 497,) from June 20, 1850, until July 10, 1854; but did not then, nor thereafter, pay the fee required by law for the patent certificate, and died thereon, intestate, in the year 1868; that on February 28, 1870, upon the application of the administrator of said Charles Cutting, and upon the payment by him of the necessary fee therefor, a patent certificate for said donation was issued to said Abigail, the widow of said Charles Cutting, and to the "heirs at law" of the latter—the south half to said Abigail and the north half to said heirs; and that after-

wards, on May 5, 1875, a patent was issued by the United States for said donation accordingly; that said Charles Cutting left surviving him David, Charles, and Adelia, his children, and also Ira, the plaintiff herein, and Emma, the children of his son A. J. Cutting, who died in the year 1855; that on April 4, 1869, said Emma was married, and that said Ira has duly acquired whatever interest said Emma had in said donation; that said Trullinger's title to said 116 acres consists in a conveyance to him of the same by the administrator aforesaid, in pursuance of a sale by him upon the authority of an order of the county court of said county to pay the debts of his intestate, and that the proceedings in which said order and sale were made were due and regular, except that said Emma was not served with any citation or process therein; and that the defendants' interest in the premises is, as alleged in their respective answers, unless the said Ira and Emma are entitled to an undivided one-fifth thereof under the donation act aforesaid and the facts herein stated, "as *children or heirs at law* of said Charles Cutting, deceased."

The questions of law which arise upon these facts depend principally for their solution upon the proper construction of that portion of section 4 of the donation act which provides (9 St. 497) that in all cases where the donees thereunder, being married persons, "have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon."

The same section also contains a proviso declaring "void" "all future contracts * * * for the sale of the land," to which any person "may be entitled under this act, before he or they have received a patent therefor." But this proviso was repealed by section 2 of the act of July 17, 1855, (10 St. 306,) with the following qualification: "*Provided*, that no

sale shall be deemed valid unless the vendor shall have resided four years upon the land."

In *Barney v. Dolph*, 97 U. S. 652, Mr. Chief Justice Waite, speaking for the supreme court, held that this repeal of the prohibition to sell "was, under the circumstances, equivalent to an express grant of power to sell" after "the right to a patent had been fully secured;" and that such repeal did, by a necessary implication, "in cases where sales were made," repeal the above provision in section 4, giving the interest of the settler in the donation, in case of his death before patent, to his devisee, or wife and children, or heirs, saying: "Any provision in the act transferring the title of the settler, in case of his death before receiving the patent, to his child, heir, or devisee, is palpably inconsistent with an unlimited power to sell and convey the land. The two cannot stand together, and consequently the power of sale, which was the latest enactment, must prevail."

This construction of the act, however, leaves the interest of the settler who dies without a patent and without a sale to go or pass as originally provided—to his wife and children, or heirs, or devisee, as the case may be.

In *Hall v. Russell*, decided at the present term of the supreme court, Mr. Chief Justice Waite, speaking for the court, held that a settler upon the public lands under the donation act, prior to the completion of the four years' residence and cultivation required by the act, had only a possessory right thereto—that is, "a present right to occupy and maintain possession so as to acquire a complete right to the soil;" and that such settler was not qualified to take as a grantee under the act "until he had completed his four years of continued residence and cultivation," and performed "such other acts in the meantime as the statute required in order to protect his claim and keep it alive," such as giving "notice of the precise tract claimed," and proving "the commencement of the settlement and cultivation;" and that therefore a settler, dying before the completion of such residence and cultivation, had no estate in the land to dispose of by will or otherwise, but that under section 8 of the act his

possessory right went to his heirs, who, upon making proof of the settlement and death of their ancestor, took the land, not from their ancestor, but as the grantees and donees of the United States.

Under these decisions, as well as others of this court, it is clear that the interest of Charles Cutting in this donation, whatever it was, terminated with his life, and that the land was not thereafter liable for his debts or subject to sale by his administrator, but thereupon became and was the absolute property of his wife and children, as the direct donees and grantees of the United States. In other words, they took by purchase and not descent. *Fields v. Squires*, 1 Deady, 382; *Lamb v. Starr*, Id. 451.

The power of sale or devise which the settler had upon the completion of his residence and cultivation was never exercised, and therefore the survivor and children became entitled to the premises, as though such power had never existed.

Doubtless this power of sale ought to be construed to include the power to impose a charge or lien upon the premises, as by mortgage, which should bind the interest of the deceased in the donation to the extent of such lien, as in the case of an outright sale. But in the case of a settler dying without a patent, and leaving debts not secured upon his interest in the donation, the creditors have no claim upon the property as against the survivor and children, and therefore a sale by the administrator of the deceased settler is void. Therefore, the sale to Trullinger by Cutting's administrator gave the former no interest in the premises.

The next question to be considered is, can or ought the word "children," as used in this connection, be construed to include grandchildren? It is admitted that ordinarily and properly the former term does not include the latter; but it has been so construed in the case of wills where it appeared from the context that such was the intention of the testator. *Bouv. Dict. verba*, "Children." A power to appoint an estate to the use of *children* has been held not to include grandchildren. But Chancellor Kent, while admitting this to be

the settled rule in the construction of powers, does not hesitate to characterize it "as a very strict and harsh" one. 4 Kent, 345.

The principal authority cited by the defendants upon this point is *Adams v. Law*, 17 How. 417. In this case the question arose upon the construction of marriage articles to secure a jointure to the intended wife. The articles provided that in case of the death of the husband before the wife, she should have the use of certain real property during her life; but in case of her death before his, "leaving *issue* of the said marriage one or more *children then living*," upon the death of the husband the property was to go "to the child or children of said marriage" in fee-simple. The daughter and only child of this marriage intermarried with Lloyd N. Rogers, and died before her mother, leaving two children, who, upon the death of their grandparents,—the grandmother dying first,—claimed to be entitled to take under the articles as the representatives of their deceased mother.

The court below allowed the claim, but the supreme court held otherwise, saying: "The word 'issue' is a general term, which, if not qualified or explained, may be construed to include grandchildren as well as children. But the legal construction of the word 'children' accords with the popular signification, namely, as designating the immediate offspring;" but admitted that in the case of wills, where such appeared to have been the intention of the testator, grandchildren had been allowed to take under a devise "to my surviving children."

But the court was evidently influenced by the consideration that the principal object of the articles was to make a provision for the intended wife, and not the issue of the marriage, and also that the children to whom the estate was limited, upon the double contingency of the wife dying before the husband and their surviving them both, were "*children then living*;" that is, at the death of the mother and the father.

But in *Walton v. Cotton*, 19 How. 355, the court held that the word "children," in the act of congress of June 2, 1832,

and the several acts supplemental thereto, granting arrearages of pensions to certain officers of the revolution, and, in case of the death of any such officer before the date of the act, then to his widow, if there was one living, and, if not, to his *children*, included the grandchildren of a deceased pensioner, whether their parents died before or after the death of such pensioner, and that they were entitled to take their share of such pension as the representatives of their deceased parent.

In the course of the opinion of the court, Mr. Justice McLean says: "Should the word 'children,' as used in these statutes, be more restricted than when used in a will? In the construction of wills, unless there is something to control a different meaning, the word 'children' is often held to mean grandchildren. There is no argument that can be drawn from human sympathy to exclude grandchildren from the bounty, whether we look to the donors or the chief recipient. Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered. But to withhold any arrearage of this bounty from his grandchildren, who had the misfortune to be left orphans, and give it to his living children on his decease, would not seem to be a fit discrimination of national gratitude. * * * Congress has not named grandchildren in the acts, *but they are included in the equity of the statutes*. And the argument that the pension is a gratuity, and was intended to be personal, will apply as well to grandchildren as to children. * * * On a deliberate consideration of the above statutes we have come to the conclusion that the word 'children,' in the acts, embraces the grandchildren of the deceased pensioner, whether their parents died before or after his decease. And we think they are entitled, *per stirpes*, to a distributive share of the deceased parent."

This case is decidedly in point. The analogy between it and the case at bar is complete and instructive. The grant proffered by the donation act—particularly the fourth section

thereof—was a bounty to the parents in consideration of the timely and important services rendered by them in the occupation and settlement of the country; and in case of the death of either of them without having received a patent for the donation, the “benign policy” of the act was to secure this bounty, first to the immediate *family* of the deceased—his widow and “children;” and for lack of the latter, to her and his “heirs” generally. The children of the deceased child of Charles Cutting are certainly within the equity of the statute—more so, even, than were the grandchildren of the deceased pensioner; and there is nothing in the circumstances of the case or the reason of the provision which should exclude them, as the representatives of their parent, from participating in the bounty of the government. Owing to his comparative age and ability the deceased child may have largely shared with his father the journeyings, hardships, and labor which were involved in obtaining this donation, and in this respect may have been the most deserving of the family.

This is a beneficial statute—a measure of general utility and justice—particularly the clause under consideration, which provides for the disposition of the donation in case the settler dies before he has obtained a patent, and should therefore have a liberal and benign interpretation. Smith’s Com. § 480. Such has been the spirit in which the act has been construed by the courts. Indeed, in *Silver v. Ladd*, 7 Wall. 224, the supreme court held that a single woman was included in the description of persons capable of receiving a donation under the fourth section. In delivering the opinion of the court, Mr. Justice Miller characterizes the act as “one of the most benevolent statutes of the government;” and, particularly in speaking of the construction of this fourth section, says: “Anything, therefore, which savors of narrowness or illiberality *in defining the class*, among those residing in the territory in those early days, and partaking of the hardships which the act was intended to reward, *who shall be entitled to its benefits*, is at variance with the manifest purpose of congress.”

And according to a celebrated collector of the curious and interesting events and customs of past ages, this question was the subject of a judicial combat in the tenth century, when, the champion in behalf of the rights of the grandchildren proving victorious, "it was established by a perpetual decree that they should thenceforth share in the inheritance, together with their uncles." 1 D'Israeli's *Curiosities of Literature*, 233.

It appears, then, that both upon reason and authority, ancient and modern, that the word "children," as used in the clause under consideration, was intended by congress to include *all* the children of the deceased settler—the living ones actually and *per capita*, and the deceased ones by their legal representatives and *per stirpes*. This being so, the plaintiff, as the representative of A. J. Cutting, a child of the deceased settler, and the grantee of his sister, Emma Cutting, is entitled to an undivided one-fifth of the north half of the donation. But, upon the face of the patent and the conveyance from his sister, it appears that the plaintiff is so entitled without reference to the question whether he and she would be included in a grant to the "children" of Charles Cutting, deceased. The patent grants the premises to the "heirs at law" of Charles Cutting, and ignores the right of the survivor (Abigail Cutting) altogether. In this respect it may be considered void upon its face, as it discloses the fact that there was a survivor to whom the act gave an equal part in the premises with an heir. *Davenport v. Lamb*, 13 Wall. 428; *Lamb v. Starr*, 1 Deady, 358.

The heirs, whoever they may be, can only take in default of children. The act substitutes them for children in case there are none of the latter. *Lamb v. Starr*, *supra*; 1 Red. on Wills, 486-7.

But whether the patent should issue to the children or heirs involved a question of fact to be determined by the land department before it was issued. If the evidence showed that the deceased settler left no children, then the patent should have been issued to his heirs, but not otherwise. The patent having been issued to the heirs, the presumption is that there

were no children. And although it appears from the agreed case that such is not the fact, yet this cannot affect the patent, which may not be avoided at law for matter *dehors* the record. *Sharp v. Stephens*, C. C. D. Or. Aug. 25, 1879, and cases there cited. In this case it was held that a patent could not be contradicted at law by showing that the wrong person was named therein, as the wife of the settler and grantee of one-half of the donation.

Who are the *heirs* of Charles Cutting is a matter to be determined solely by the local law—the law of Oregon. As was said by this court in *Lamb v. Starr*, *supra*, “the donation act does not prescribe who shall be considered the *heirs* of a deceased settler any more than it prescribes who shall be considered the *wife* of a settler. Both these are left to the local law—the law of Oregon. * * * Who would be entitled to claim as heir of the deceased would in all cases depend upon the law of Oregon at the time of the death; but persons claiming *as children*, are by the donation act preferred to those claiming simply as *heirs* by the local law.”

By the law of this state, at and before the death of Charles Cutting, his children, including “the issue of any deceased child, by right of representation” were his heirs. Or. Laws, 547. The patent being to the heirs for the north half of the donation, gives the plaintiff and his sister, as the issue of A. J. Cutting, an equal interest therein with the surviving children of the deceased settler. And the patent having given the premises to the heirs without including the surviving widow, the interest of each heir would be an undivided one-fourth. But, as has been said, this omission of the widow from the grant in this respect is shown upon the face of the patent to be erroneous, and may therefore be disregarded here. The plaintiff is entitled, upon the patent and the agreed case, to recover an undivided one-fifth of the whole premises.

And upon this view of the matter it may have been unnecessary to pass upon the question whether grandchildren are included in the word “children” or not. But the argument of the case turned mainly upon this point, and counsel for

the defendant was urgent that it should be decided, so as to avoid the expense and delay of further litigation.

As it is, the court having determined that the grant to the children of the deceased settler, Cutting, included the children of his deceased son A. J., the word "heirs" in the patent is practically the exact synonym of the word "children" as used in the statute; and although the patent should have been issued to the children instead of the heirs, still the effect and operation given by it to the grant coincides with the true intent and meaning of the act.

PENCE, Assignee, etc., v. COCHRAN and others.*

(*District Court, S. D. Ohio. March, 1881.*)

1. JUDGMENT LIENS—LEX FORI—RULE OF DECISION IN FEDERAL COURTS.

The lien of judgments depends upon the laws of the state in which they are asserted; and the federal courts, in determining their nature and priority, will be governed by the construction put upon those laws by the highest courts of the state.

2. SAME—OHIO—PRIORITY—LEVY WITHIN A YEAR.

Under the laws of Ohio regulating the liens of judgments, a judgment levied within a year from its rendition, upon a part of the lands of the judgment debtor, is not a lien upon the lands not levied upon, as against a subsequent judgment rendered more than a year after the first, and levied upon such lands within a year from its rendition.

3. SAME—BANKRUPT LAW.

Under the bankrupt laws of the United States, the liens of judgments and their priority is to be determined as they existed at the time of the adjudication in bankruptcy.

4. SAME—SAME—OHIO—PRIORITY—LEVY WITHIN A YEAR.

Where D. had recovered a judgment against the bankrupt, and at a subsequent term of the court M. recovered a judgment against him, neither of which was levied, and before the expiration of a year from the rendition of the judgment first rendered the judgment debtor was adjudicated a bankrupt, *held*, that both these judgments were liens upon the lands of the judgment debtor not levied upon by a judgment rendered more than one year before the rendition of the first judgment, and must be paid in the order of their rendition.

*Reported by Messrs. Florien Giaume and J. C. Harper, of the Cincinnati bar.

In Bankruptcy. Exceptions to the Register's Report.

White, McKnight & White, for assignee.

D. W. C. London, for Brown county.

D. W. Thomas, for Moore and Dunn.

SWING, D. J. From the report of the register it appears that on the twenty-fourth day of November, 1874, the commissioners of Brown county, Ohio, recovered, in the court of common pleas of Brown county, a judgment against Reece Jennings, the bankrupt, and 18 others, for \$22,620.12. It further appears that, at the time of the rendition of said judgment, Reece Jennings was the owner of two separate tracts of land situate in said county of Brown; that afterwards, to-wit, on the twenty-third day of November, 1875, the commissioners caused execution to be issued upon said judgment, which was levied upon one tract of said land only; that on the thirteenth day of June, 1877, James H. Dunn recovered in the common pleas court of Brown county, Ohio, a judgment against the said Reece Jennings for the sum of \$1,185.05; that Reece Jennings, on the twenty-fourth day of August, 1877, in pursuance of a contract entered into on the seventeenth day of May, 1877, conveyed to Louisa Kaeble, in consideration of the sum of \$2,257, the tract of land which was levied upon by virtue of the execution issued on the judgment in favor of said commissioners; that on the twentieth day of October, 1877, R. C. Moore recovered, in the court of common pleas of Brown county, Ohio, a judgment against the said Reece Jennings for the sum of \$839.49. It further appears that the said Reece Jennings, on his own petition, was, on the fourteenth day of December, 1877, adjudicated a bankrupt. It further appears that no executions were issued upon the judgments in favor of James H. Dunn and R. C. Moore. It further appears that the execution issued upon the judgment in favor of the commissioners of Brown county was also levied upon the lands of 16 other defendants, but it does not appear that an appraisement of any of the lands was made, nor does it appear what was the value of the lands levied upon. By proceedings under orders of this court, the tract of land owned by the bankrupt, and not levied upon

under the judgment of Brown county, was sold by the assignee, and the proceeds, after the payment of costs, is insufficient to pay the judgments of Brown county, of James H. Dunn, and that of R. C. Moore; and it was claimed before the register, by counsel for Brown county, that the proceeds of the sale should be directed to be paid upon that judgment; and by counsel for Dunn and Moore, that they should be paid to them. The register decided that the proceeds should be applied—*First*, to the judgment of James H. Dunn; *second*, to that of R. C. Moore. And to this finding the county has excepted.

The determination of this question involves the construction of the statutes of Ohio, declaring and regulating the liens of judgments, section 5375 of which provides that "such lands and tenements within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which judgments are rendered; and all other lands, as well as goods and chattels, of the debtor shall be bound from the time they are seized in execution." And section 5415 provides that "no judgment on which execution is not issued and levied before the expiration of one year next after its rendition shall operate as a lien on the estate of a debtor to the prejudice of any other *bona fide* creditor." These are the two sections of the statute which bear directly upon the question in this case, and which control its decision. The supreme court of the state has been several times called upon to construe and apply them; and if we can ascertain the construction which they have given to them, and can apply that construction to the facts of this case, we must be governed by it. *Bank of U. S. v. Longworth*, 1 McLean, 35.

The first case in which these sections were construed is that of *McCormack v. Alexander*, 2 Ohio, 66, in which it was held by the court that judgment creditors who had not sued out and levied executions within one year from the date of their judgments lost their lien and preference as against sub-

sequent judgment creditors who had sued out and levied executions within one year. In that case there was but a single piece of land levied upon by the several executions.

The second case is that of *Patton v. Sheriff of Pickaway Co.* 2 Ohio, 396, in which it was held that when a levy is set aside parties stand in the same situation as if no levy had ever been made; and where such levy had been made within the year upon a senior judgment and set aside, it lost its lien as against a junior judgment which had been levied within the year.

The next case is that of *Earnfit v. Winans*, 3 Ohio, 135, in which it was held that the statute which restrained a levy upon the property of the surety until that of the principal was exhausted did not operate to preserve the lien of a judgment upon which execution had not been levied within the year, and a junior judgment upon which execution had been levied within the year was held to be the prior lien.

The next case is that of *Shuee v. Ferguson*, 3 Ohio, 136. From the statement of facts in that case it appears that the Bank of the United States obtained a judgment against Ferguson and others on January 8, 1822, in the circuit court of the United States for the district of Ohio, and on August 20, 1823, caused an execution to be levied on a quarter section of land of the defendant Ferguson, by the sale of which, on an older judgment, a surplus was produced. The Lebanon Banking Company obtained a judgment against Ferguson and others in August, 1823, but did not cause execution to be levied upon the land upon which the first execution was levied. Hansburger and Selley, in May, 1823, obtained judgment by attachment against Ferguson as a debtor of the Lebanon Bank, and also obtained an assignment of the judgment in favor of that bank against Ferguson, and on December 23, 1826, caused execution to be levied on the land in question. Thomas Shuee obtained a judgment against the same defendants on December 24, 1825, and caused an execution to be levied upon the land in question on the twenty-third of December, 1826. I. Emlin obtained a judgment against the same defendants on December 24, 1825, and caused an exe-

cution to be levied on the same land on December 23, 1826. It does not appear from the statement of facts, or from the opinion of the court, whether execution had been issued upon the judgment in favor of the Lebanon Banking Company, and levied within the year upon other lands of the defendants than the tract, the proceeds of which were in dispute. I thereupon sent to the clerk of Warren county to ascertain whether the records in the common pleas or supreme court of the county showed whether such levy had been made, and he forwarded me the original papers in the case in the supreme court. The record upon which the *certiorari* was granted, and upon which the case was disposed of by the supreme court, contains an agreed statement of facts, from which it appears that execution had been issued upon the judgment in favor of the Lebanon Banking Company, and had been levied within the year upon other property than that in dispute, and that this levy was made before the levy of the execution upon the judgment in favor of the Bank of the United States had been levied upon the property in dispute. The court of common pleas ordered the proceeds to be paid to the assignees of the Lebanon Bank, on the supposition that they had the oldest and best lien; and the fourth assignment of error in the case in the supreme court was "because the execution issued on the judgment in favor of the Lebanon Bank, and on which the levy was made on said premises, the proceeds of which are the subject of dispute in this case, was irregular, it appearing that the property levied upon under a prior execution issued on said judgment remained undisposed of at the time of issuing of said execution on which the levy was made upon the premises sold belonging to said defendant Ferguson, and from the sale of which the money in dispute was made;" and the fifth assignment of error was "because the lien of the judgment of the Lebanon Bank on any other property than such as was then levied upon, if it was not absolutely discharged, and rendered void by said attachment, was lost, under the operation of the execution laws of 1822, in having the premises then levied upon offered for sale as the law directed, and the levy

v.6,no.3—18

or appraisement on both of them set aside within six months, or such other time as that law required;" and the sixth assignment of error was "because the execution on the judgment of the Lebanon Bank was not levied on the mortgaged premises which were sold, nor any other of the defendant Ferguson's property, within one year after the rendition of said judgment, according to the provisions of the laws of Ohio at that time in force, and particularly of the statute of February, 1824." From this it appears that the question of there being a levy upon other property was brought directly before the court, and the record, therefore, shows clearly that the question was considered, and it was the fact in the case upon which the decision was based. The supreme court in that case says that they decided the following points:

First, to take a case out of the operation of the seventeenth section, (now 5415,) a levy must have been made on the property in question within a year after the rendition of the judgment. A levy on other property, though within the year, will not save the lien as to the property not levied upon. *Second*, if there are several judgments, and the property in question has not been levied upon within the year under either of them, they stand on an equal footing, and the judgment creditor who first takes out execution and causes a levy to be made will have the preference. *Third*, if execution on an older judgment has not been levied upon a particular piece of property within the year, and an execution upon a junior judgment has been levied upon that property within the year, the junior judgment must have the preference, although a levy may have been made on the same property under the older judgment before the levy was made on the junior judgment. The lien of the junior judgment on all the property not levied upon under the older judgment within the year must continue from one year from its date to the exclusion of the older judgment, provided the junior judgment was rendered before the levy was made on the older judgment. A levy on the older judgment, though after the year, if made before the date of the junior judgment, will have the preference."

And this is in accordance with the decision of this court in the *Bank of U. S. v. Longworth*, 1 McLean, 35. In that case Justice McLean says: "Under the act of 1824, in the case of *Shuee v. Ferguson*, 3 Ham. (3 Ohio) 136, the supreme court decided that to continue the lien of the judgment upon any particular piece of real estate there must be a levy upon it within the year; that a levy upon property releases all other property not levied upon from the lien of the judgment, and that such property may be taken in execution on a junior judgment." Justice McLean further says: "I confess I entertain some doubts as to the correctness of the decision, which in effect transfers the lien from the judgment to the levy of the execution. If the lien of the judgment be limited to the property levied upon, the judgment, after the levy, has no binding force upon other real property within the county. The policy of the act seems to require diligence by a judgment creditor, and prevents his holding a judgment over the property of the debtor so as to prevent other creditors from reaching it. But it would seem to me that the policy of the act, as well as its letter, would be carried into effect by issuing an execution on a judgment in good faith within the year, and pursuing it with diligence; that the lien of the judgment should not be limited to the property levied on, but should continue to cover all the real property of the defendant within the county until the money was made. The supreme court, however, has decided this question, and as their decision giving a construction to the statute forms the rule of decision in this court, I am disposed to acquiesce in the decision."

The principle of the latter cases applies to this. A levy was made under the judgment in favor of Brown county, within a year from its rendition, upon a part of the lands of the judgment debtor, but not upon the lands in controversy. The judgments in favor of James H. Dunn and R. C. Moore were rendered more than one year after that of Brown county. Under neither of these judgments was a levy made, but before the expiration of the year from their rendition the defendant judgment debtor was adjudicated a bankrupt, and his estate passed into the hands of an assignee; and the

rights of the parties must be determined as of the date of the adjudication of bankruptcy. *Scott v. Dunn*, 26 Ohio St. 63. At that date the judgment of Brown county, as to the property in controversy, had lost its lien as against the judgments of Dunn and Moore, more than one year having elapsed since its rendition; but less than one year having elapsed since the rendition of the judgment in favor of James H. Dunn, it had not lost its lien as against the judgment in favor of R. C. Moore, and, there having been no levy under either of the latter judgments, they must be paid in the order of their rendition—first the judgment of James H. Dunn, and second that of R. C. Moore.

In re A. H. ENGLISH & Co., Bankrupts.

(District Court, W. D. Pennsylvania. March 12, 1881.)

1. STATUTES OF LIMITATION—REMEDY.

Statutes of limitation operate upon the remedy, not the title.

2. SAME—ASSIGNEE IN BANKRUPTCY—REV. ST. § 5057.

An assignee in bankruptcy is not precluded from defending against a claim by the wife of the bankrupt for a copyright royalty upon the ground that the copyright was transferred to her by her husband in fraud of his creditors, because he did not, within the two years limited by section 5057 of the Revised Statutes, proceed by suit to recover the copyright or have the transfer set aside.

In Bankruptcy. *Sur* rule on A. B. Hay, Esq., assignee, to show cause why a copyright royalty should not be paid to Mrs. Emily English, trustee of Lucius Osgood English.

Knox & Reed, for Mrs. E. English.

A. B. Hay, for assignee.

ACHESON, D. J. Among the effects of the bankrupts which came into the hands of the assignee was a stock of school-books, which he sold pursuant to an order of court made upon his petition. No lien is specified in the petition or order other than the lien of one Hart for printing and binding part of the books. But just before the sale the assignee procured an

order of court authorizing him to pay Mrs. Lucius Osgood, the owner of one-half of the copyright of the books, a copyright royalty, and after the sale he paid her the same to the amount of \$1,224.41.

On March 28, 1879, Mrs. Emily English, the wife of A. H. English, one of the bankrupts, as trustee of Lucius Osgood English, son of the bankrupt, presented her petition, claiming to be the owner of the other half of the copyright, and to be entitled to a like royalty to that paid Mrs. Osgood, and praying the court to order the assignee to pay the same to her. Thereupon a rule was granted upon the assignee to show cause why he should not make such payment. After answer to this rule, and argument, the court, on April 12, 1879, discharged the rule. The petition, however, was not dismissed, and is still pending.

On January 31, 1881, another petition of like character was presented to the court by Mrs. English, as trustee of Lucius Osgood English, and a rule was granted upon the assignee to show cause why an order should not be made directing him to pay the petitioner out of the proceeds of said sale the royalty claimed. To this petition and rule the assignee filed an answer. The petitioner set down the rule for hearing, and it was heard upon the petition and answer. I need scarcely say that in disposing of this rule the answer must be taken as true. In substance it alleges that A. H. English, who owned the one-half of the copyright now claimed by Mrs. English as the basis of her claim to royalty, transferred the same, without consideration, to his wife, the petitioner, in trust for his son Lucius, some months before his petition in bankruptcy was filed, at a time when he was in financial embarrassment—under an extension which he had procured from his creditors—and insolvent; that this transfer of the copyright was made to defraud his creditors; and that at the date of his adjudication as a bankrupt A. H. English, in point of fact, was the owner of the said one-half of the copyright.

If the allegations of the answer are true, it is very clear that the petitioner has no honest claim to the royalty she

seeks to recover in this proceeding. Nevertheless, it is very earnestly contended in her behalf that her right to demand this money is not to be disputed by the assignee, because he did not, within the two years limited by section 5057 of the Revised Statutes, proceed by suit at law or in equity to recover the copyright from the petitioner, or to have the transfer to her set aside. It is said her title to the copyright is not now assailable by any direct proceeding, and therefore that the assignee is estopped from calling it in question or denying her claim to the fruits of the copyright. The argument may be ingenious, but surely it is fallacious as applied here. It amounts to this: that because the statute of limitations has barred a suit against the petitioner, the righteous defence of the assignee to a demand which (if his statements are true) is totally devoid of justice has been taken away. This would be to give to the statute of limitations, when it has once closed, the force of a judicial decree establishing conclusively the rights of the parties. But such is not its operation. Statutes of limitation operate upon the remedy, not the title. *Leasure v. Mahoning Township*, 8 Watts, 551; *McCandless' Estate*, 61 Pa. St. 9; *Hegarty's Appeal*, 75 Pa. St. 503.

To avoid misapprehension I desire to add that I am not to be understood as expressing any opinion upon the merits of this claim. Upon investigation it may appear to be entirely fair and valid. The allegations of the assignee against its fairness are to be proved. All that now is decided is that in the face of the assignee's answer the court cannot make the order asked for.

The rule to show cause will be discharged without prejudice to the right of Mrs. English to prosecute her petition or to pursue any other appropriate remedy for the recovery of the royalty claimed. So ordered.

SINGER MANUF'G CO. v. STANAGE.

(Circuit Court, E. D. Missouri. March, 1881.)

1. TRADE-MARK—PATENTED ARTICLE—SPECIFIC DESIGNATION.

Where a word indicates a patented machine of peculiar mechanism, such word cannot be protected as a trade-mark upon the expiration of the patent.

2. SAME—"SINGER" MACHINE.

Certain patented sewing machines were known as the "Singer" machines. *Held*, that the word "Singer" was not a trade-mark, and became common property upon the expiration of the patent.

In Equity.

Taylor & Pollard, for plaintiff.

Marshall & Barclay, for defendant.

TREAT, D. J. This is a suit for an alleged violation of plaintiff's trade-mark. It seems that the plaintiff has pursued its controversy on both sides of the Atlantic, generally with success. The decisions of the foreign and American courts have been cited and examined. While reference is made in many of them to actual or supposed patents, issued and expired, no one of said cases, except that by Judge Drummond, states with directness what should be the turning point in the controversy. The case of the plaintiff against Wilson (3 Appeal Cases, 376) turned more on questions of practice than on the rules by which the rights of the parties were to be ultimately determined. That case and others in England, and the great number of cases in American courts, (notably, *Manuf'g Co. v. Trainer*, 101 U. S. 51,) ought to make clear the rules controlling this litigation. It would be tedious and unprofitable to review the many authorities cited. In the case from the English house of lords, (*supra*,) and in the case (*supra*) from the United States supreme court, there were differing opinions on the merits. Each of the many cases cited has its distinctive peculiarities, and, while all courts agree that property interests in trade-marks should be protected, there is a strange diversity of reasoning as to the true basis on which such interests should rest.

It is not necessary for the solution of the rights of parties litigant in this suit to enter upon so wide a field of analysis or discussion. At the opening of the argument this court directed the attention of counsel to what seemed to be a matter of large moment, but as the pleadings and evidence had been prepared in the light of leading English and American cases, the cause progressed at great length, calling for the remark that despite these cases a large amount of irrelevant testimony was presented; or, rather, that while counsel had been diligent in their preparation, not knowing what views this court might entertain, much of the evidence seemed to apply rather to infringements of patents than a violation of trade-marks. Still, many of the leading cases have taken that course, to what seems to be a confusion of rights.

This case furnishes an apt illustration. The plaintiff and its predecessors had, in connection with others, through patents, a monopoly as to certain sewing machines, known as the "Singer" machines. When these patents expired every one had an equal right to make and vend such machines. If the patentees or their assignees could assert successfully an exclusive right to the name "Singer" as a trade-mark, they would practically extend the patent indefinitely. The peculiar machine which had become known to the public under that name during the life of the patents was so known as a specified article of manufacture, and at the expiration of the patent would still be known on the market by that designation, irrespective of the name of the special manufacturer. No one had an exclusive right to the use of the generic name. If one wished to acquire a trade-mark in connection therewith he could do so distinctively. The plaintiff accordingly adopted specific devices, including its own name, whereby its products could be distinguished. The defendant adopted a different device, with the name of his manufacturer, "Stewart," and advertised the sale sometimes of the "Stewart" machines, and sometimes of the "Stewart-Singer" machines, attaching his name as "late general manager of the Singer Manufacturing Co."

It is contended that, although he and others had an indu-

bitable right to manufacture and sell the "Singer" machines—that is, machines known as such in the market—so far as their mechanism is concerned, they had no right to advertise or sell them by their right names, with or without a prefix. How is it that the plaintiff corporation acquired a monopoly of the name, whereby it could exclude, after the expiration of the patent, all others from making or vending the machines under the only name known to the public?

A review of the many cases cited leads to the following conclusions:

First. That when a patented article is known in the market by any specific designation, whether of the name of the patentee or otherwise, every person, at the expiration of the patent, has a right to manufacture and vend the same under the designation thereof by which it was known to the public.

Second. That the original patentee or his assignees have no right to the exclusive use of said designation as a trade-mark. Their rights were under the patent, and expired with it.

Third. If a corporation or person wished to establish a trade-mark or name, indicative of its own special manufacture of such a machine or product, the right must grow up, just as all other rights of the kind are established—by use and acquiescence. Thus, as every one at the expiration of the patent had a clear right to manufacture and vend what was known as the "Singer" sewing-machine, the plaintiff could acquire no exclusive right to the name "Singer," but could by proper trade-mark appropriate to itself names or devices indicating its own manufacture of such machines.

Fourth. The plaintiff did adopt special names and devices to indicate what it put on the market as its manufacture, viz., "The Singer Manufacturing Company," imprinted on the shield and arm of the machine, etc. The defendant placed on its shield and arm the words, "The Henry Stewart's Manufacturing Co.," with another device. Now, as each corporation had an equal right to make and vend that class of machines known in the market as "Singer" machines, and as the defendant used neither the name nor device of the

plaintiff, there is no violation of the plaintiff's trade-mark or name. While the courts are prompt to protect the property rights of any skilled person in his trade-mark or name, whereby he may have in the market the benefit of his skill and reputation, they must also guard against every effort to secure a monopoly not arising therefrom. When a marketable product is publicly known or designated by a generic name, no one should be permitted to shut out all just competition by claiming the exclusive right to use that name. If there is a peculiar excellence, real or supposed, in his manufacture, he can establish by his trade-mark or name the right to protection against the piracy thereof; but he cannot go further and insist that, independent of his personal skill or manufacture, he can cover by his trade-mark or name whatever may properly distinguish the common article which every one has a right to make or vend.

Fifth. Inasmuch as the word "Singer" indicates a machine of peculiar mechanism, and every one has a right to make such a machine, the word "Singer" attached to such machines is common property.

Sixth. The distinctive names and devices of the plaintiff corporation were not used by the defendant, and no one of ordinary intelligence could suppose that the "Stewart" manufacture was the manufacture of the plaintiff. Each had its distinctive and detailed names and devices, so that there was no probability that the machine made by one would be mistaken for the manufacture of the other.

These views dispose of the case; yet it is important to remark that the plaintiff is seeking, after the expiration of one or more patents, to perpetuate a monopoly under the guise of a trade-mark. The propositions involved have undergone so much judicial investigation in transatlantic and cisatlantic courts that a summary disposal of the question may seem inadequate to the exigency of the case; yet each of said cases would show, if properly analyzed, that the general rule is admitted by all.

There are many technical objections interposed with respect to evidence offered; yet, giving the objector the largest bene-

fit therefrom, there still remains the clear fact that the plaintiff, even if its assignment covered the name as a trade-mark, (which is very doubtful), is seeking to create a monopoly for the practical extension of a patent beyond its legal term. The plaintiff has established no such right, nor has the defendant consequently violated any of plaintiff's rights.

The bill will, therefore, be dismissed at plaintiff's costs

EMIGH v. B. & O. R. Co.

STEVENS v. SAME.

STEVENS, use of EMIGH, v. SAME.

(Circuit Court, D. Maryland. March 17, 1881.)

1. INFRINGEMENT OF PATENT—EXCEPTIONS TO MASTER'S REPORT.

The Stevens patent for improvement in railroad-car brakes, which expired in 1872, having been held valid, upon reference to a master he reported that the advantages derived by the defendant from its use amounted to \$30 per car per year, and that finding that during the latter years of the existence of the patent there was an established license fee of \$25 per car per year, he assessed the complainant's damages at that rate from the time the license fee was established. *Held*, that the master's findings, as to both profits and damages, were warranted by the testimony, but that, as it was difficult to compute with exactness the money value of the advantages accruing to the defendant from the use of the patent, and as there was conflict of testimony on that subject, the court would accept the license fee as the basis of compensation least likely to do injustice, and would decree as for profits at that rate, without interest.

In Equity. Exceptions to Master's Report. Before BOND and MORRIS, JJ.

George Harding and Albert H. Walker, for complainants.

John H. B. Latrobe and Andrew McCallum, for defendant.

MORRIS, D. J. These are three suits in equity against the Baltimore & Ohio Railroad Company for infringement of the patent, dated the twenty-fifth of November, 1851, granted to Francis A. Stevens for an improvement in railroad-car

brakes. The original patent expired in 1865, and was extended for seven years, terminating the twenty-fifth of November, 1872. At the November term, 1872, this court, (*Giles, J.*.) sustained the validity of the patent, and decided that the defendant had infringed, and these cases went to the master, (Robert Lyon Rogers, Esq.,) to state an account of gains and profits, and to assess damages. On this accounting the parties have examined witnesses at great length during a period of some six years, and the master, in November, 1880, filed his reports in all three cases, together with the testimony (which is contained in two large printed books) on which he based his findings.

The master reports the number of cars on which, in each year, the defendant used the complainants' patent, commonly known as the "Stevens" brake, and reports that he finds from the testimony that the defendant did derive savings and advantages in the use of the "Stevens" brake over what it would have derived from the use of any other similar device open to the public.

The master further reports that he finds that the savings and advantages which so accrued to the defendant from such use, amounted to \$30 per car per year and at that rate he finds the gains and profits which the complainants are entitled to recover, amounting in the aggregate to \$102,480. He further reports that during the period covered by two of the suits, viz., from 1857 to the expiration of the patent, he finds that the complainants had established a license fee of \$25 per year per car for the use of the patent, and, assuming the license fee as the measure of complainants' damage, he assesses the damages at that rate in those two cases. But he reports that he finds no satisfactory evidence that any license fee was established during the period covered by one of the suits, viz., from 1853 to 1857, and, finding no evidence from which he can compute the damages, he finds none for that period.

The "Stevens" brake was used by the defendant on its passenger cars, and the number on which it was so used, as reported by the master is not disputed; but exceptions have

been filed by the defendant to the master's findings of gains and profits, and assessment of damages.

The defendant contends that the testimony does not show that any advantage whatever accrued to it from the use of the Stevens brake, and further contends that if there was any advantage in its use there is no testimony in the record from which the master was authorized to adopt \$30 per car per year as the money value of such advantage. The defendant also excepts to the master's finding of damages, contending that there is no evidence that any license fee was ever established.

The master reports that it was conceded before him that the brake with which the "Stevens" brake is to be contrasted in all these cases is the brake known as the "Hodge" brake, so that the question before the master as to gains and profits, and now in controversy before the court, is, "what savings or advantage, if any, did the defendant derive from the use of the 'Stevens' brake, for the period covered by that patent, above what it would have derived from the like use of the 'Hodge' brake during said period?" *Mowry v. Whitney*, 14 Wall. 620. The "Stevens" brake is claimed by the inventor to be superior to the "Hodge" brake, for the reason that by its arrangement of levers the force applied is so distributed that it exerts a uniform pressure on each wheel of both trucks. In the "Hodge" brake the force applied is distributed unequally, the two pairs of wheels at the ends of the car receiving a much greater pressure than the two pairs of inside wheels.

As the object is to have the brakes apply as much retarding pressure upon every wheel as it will bear without ceasing to revolve and beginning to slide, it would seem to follow that where the pressure is distributed equally upon every wheel it must be possible to apply a greater average of pressure, without sliding any wheel, than could be possible where the pressure is distributed unequally, for the reason that the brakeman must always desist from increasing the pressure before the wheel receiving the greatest pressure ceases to revolve; and with the "Hodge" brake, therefore, he must desist before

the wheels receiving the lesser amount of pressure have received all that they might receive without sliding.

In the effort to stop railroad trains, and to retard cars when being drawn down steep grades, it constantly happened with hand power that wheels were slid, which quickly ruins them, and it would therefore seem to follow of necessity that a considerable saving of wheels must result from the use of the Stevens in preference to the Hodge brake.

The defendant, operating a railroad of unusually difficult grades, and requiring the most effective form of brake, has, during the whole life of the patent and its extension, used the Stevens brake on its passenger cars,—its construction having been explained to the defendant's employes by the patentee himself within a year or two after the patent was granted to him. Notwithstanding this conceded theoretical superiority of the Stevens brake, and the long-continued use of it by the defendant, it now claims that experience has proved, and that the testimony shows, that in practical results the Hodge is quite as good a brake as the Stevens, and on many accounts to be preferred.

With regard to the theoretical advantage of the uniform pressure of the brakes on each wheel, undoubtedly the full benefit which otherwise might result is diminished by the inequality in the pressure of the wheels upon the rails, said to be attributable to the "tipping of the trucks," alleged to take place where the retarding force is applied. Because of this tipping, or for some reason, when the brakes are applied to stop a train the rear pair of wheels of each truck do bear upon the track with less weight than the forward pair, and will, consequently, endure less brake pressure without sliding. This is a difficulty, however, which interferes with the operations of the Stevens and Hodge brakes alike, and prevents either from yielding its best results; but it does not, so far as we have been able to see, tend to annihilate any advantage which either might otherwise have over the other. Neither pretends to deal with this peculiar difficulty, and it still remains true that no more pressure can be applied to any wheels of the car than the wheels which bear least upon the

track will endure without sliding; and as one pair of these wheels will always be one of the pairs to which the Hodge brake distributes the greater amount of pressure, that limit will be reached with the Hodge brake before any of the other wheels have received the full retarding pressure which might be safely applied to them. The difference between the pressure distributed to the end wheels as compared with the inner wheels, with the Hodge brake, as usually constructed, is $33\frac{1}{2}$ per cent. The disparity in the pressure on the track caused by the tipping of the truck when the brakes are applied to a train in motion, is estimated to be about 15 per cent. The average aggregate retarding pressure which can be applied to the wheels of a car with the Stevens brake is calculated from these data to be 20 per cent. more than with the Hodge brake.

We think that the complainants have made it appear by testimony that by the use of the Stevens brake properly constructed, and kept in effective working order, there not only should be, but that there is, particularly when operated by hand power, a very appreciable saving in the wear of car wheels; and on this point the complainants have produced some very positive testimony showing the money value of the wheels thus saved. The difficulties of proving the exact money value of this saving to this particular defendant are exceptionally embarrassing. The Stevens patent was never generally acquiesced in, and it would appear that the defendant's railroad is one of the very few on which it was introduced under the supervision of the inventor, and constructed as exhibited in his patent.

On many of the railroads on which the defendant claims that it was used, and on which it did not prove itself to be superior to the Hodge brake, it appears that it was used without license, and was so imperfectly constructed that it worked badly, and quickly got out of order. None of the difficulties testified to by the witnesses, who speak of its use on other roads in these imperfect forms, are shown by any testimony to have been experienced by the defendant.

It would also seem that the results of the use of the two

brakes in recent years, in connection with air and other power mechanically applied, is not a fair test of their relative advantages in former years when hand power exclusively was used; since, with the air power, the retarding force can be controlled to a nicety, and applied simultaneously to all the wheels of the train, so that a much less force on each wheel is sufficient to stop the train, and the risk of sliding wheels is much diminished. Nor do the special experiments made by the defendant with the two brakes alternately, convince us that there is no choice between them in respect to causing brakes to slide. In these experiments neither form of brake caused any wheels to slide. This the complainants contend is to be accounted for by the fact that the brake shoes used were made of hard polished steel, different from those formerly used on the same railroad, and that the car being quite heavy it was hardly possible to apply force enough to make the shoes hold the wheels so as to cause any of them to slide. There seems to us to be force in this suggestion. It appears highly improbable that the defendant, having special need of the best form of brake, should, for nearly 30 years, have voluntarily and continuously used the Stevens brake on all its passenger cars in the face of threatened litigation from the beginning, in the face of the decree of Judge Drummond in 1866 sustaining the patent and awarding \$50 per car per year against the Chicago, Burlington & Quincy Railroad Company as the profits accruing to that railroad from its use, and in the face of the suit instituted against the defendant in this court in 1864, unless there had been very decided advantages to be derived from its use.

The validity of the complainants' patent has been established by the decrees heretofore passed in these cases, and the defendant is now before us in the attitude of a wrongdoer. It is necessary only for the complainants to show to the court before its master, by testimony, facts upon which compensation is to be based, and by which it may be computed, as clearly as circumstances will permit. That he has been wronged has been decided. The pecuniary measure of that wrong is all we have to ascertain. To prove accu-

rately the money value of the advantages which the defendant has derived from its use of the patent is undoubtedly difficult. The complainants have been obliged in great measure to procure their witnesses from railroads whose interests are with the defendant, and the Stevens brake, as used on other roads, has been a modified and in many instances an unskillfully made form of the patented device.

Considering all the difficulties and embarrassments of the complainants' position, we are satisfied, after a careful examination of the evidence, that they have substantially sustained the burden of proof which the law imposes upon them, and that the master's findings are warranted by the testimony. It is to be considered, however, that this is a patent which was only valuable to the patentee as he could induce railroads to use it and pay him for its use and that it was worth nothing to him as a monopoly.

An established license fee, when one is proved, is unquestionably the safest rule of compensation in such cases, and in view of the great difficulty of proving with exactness the profits which have accrued to the defendant, the license fee found by the master to have existed, at least during the latter portion of the life of the patent, commends itself to us, under the circumstances of this case, as the measure of compensation least likely to do injustice to either party.

It was said by the supreme court in *Packet Co. v. Sickles*, 19 Wall. 618, that taking profits as the basis of compensation in courts of equity had produced results creating distrust of its fairness. And in *Burdell v. Denig*, 92 U. S. 720, that court, after recognizing that profits are the primary rule in equity, and a license fee in actions at law, say: "No doubt, in the absence of satisfactory evidence of either class in the forums to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained."

The testimony shows that after the validity of this patent was sustained by Judge Drummond in the United States circuit court for the northern district of Illinois, and after the decree of that court in 1866 affirming the master's report in v.6,no.3—19

the case against the Chicago, Burlington & Quincy Railroad Company, finding the profits derived by that road from the use of the "Stevens" patent to have been \$50 per car per year, the complainant fixed \$25 per car per year as the license fee for all railroads using it, and that some 18 railroads either compromised for past use or took licenses for future use substantially on the basis of that fixed rate.

Although this rate may possibly be less than the defendant's actual gain, and is less by five dollars per car per year than the amount found by the master, in the absence of more exact means of computing what that gain was, and as there is conflict of testimony on that subject, we are disposed to accept the sum of \$25 per car per year as the proper rate of profit to be decreed to the complainants in all three of these cases, and we will sign a decree in each case for an amount calculated on that basis. As we allow these sums as profits, we do not allow interest.

ROWELL and another v. LINDSAY and another.

(Circuit Court, E. D. Wisconsin. ———, 1881.)

1. COMBINATION PATENT—INFRINGEMENT.

A patent for a combination of known parts is not infringed by the use of any number of the parts less than the whole.

Sharp v. Tift, 2 FED. REP. 697.

2. SAME—NEW PARTS—INFRINGEMENT.

The use, in combination, of any of the new parts of a patented combination constitutes an infringement.

3. SAME—SCOPE OF CLAIM—NEW PARTS.

Where the invention claimed only describes the combination, the separate constituent parts of such combination should be regarded as old, or common and public.

4. SAME—OLD PART—NEW USE.

The application of an old or well-known part or thing to a new use, in a patented combination, does not constitute such invention as would render its appropriation an infringement.

5. SAME—SEPARATE ELEMENTS—ENTIRETY.

A combination must be maintained as an entirety, and no one separate element can be regarded as the distinctive and essential feature of the invention.

6. SAME—SUBSTITUTION OF PARTS—NEW FUNCTIONS—NEW COMBINATIONS.

A combination is not infringed by the substitution of a new element, or of one that performs a substantially different function; or by the substitution of an old element, not known at the date of the patent as a proper substitute for the omitted ingredient; or by a new combination of the existing elements of the patented combination.

7. SAME—INFRINGEMENT—CASE IN JUDGMENT.

A patent for an improvement in cultivators claimed the combination of a slotted beam, shank, brace-bar, and bolt, when the parts were constructed and arranged to operate as and for the purposes specified. *Held*, that such patent was not infringed by a machine which contained such slotted beam, shank, and bolt, but did not include the brace-bar, or any mechanical equivalent for the same.—[*Ed.*

In Equity.

Jas. J. Dick and *A. R. R. Butler*, for complainants.

Wood & Boyd and *J. P. C. Cottrill*, for defendants.

DYER, D. J. This is a bill to restrain the infringement of a patent for an alleged new and useful improvement in cultivators. The original patent was issued to complainants July 3, 1866. A re-issue was granted March 31, 1868. Various defences are interposed, among which is the defence that the defendants are selling cultivators made by Thomas, Ludlow & Rodgers, of Springfield, Ohio, which are covered by letters patent No. 152,706, granted to J. H. & J. W. Thomas, June 30, 1874, and they deny that they are infringing complainants' patent. In the specifications of the patent, the invention is described as consisting of the application to the shank, B, of the tooth, of a curved brace-bar, C, the upper end of which passes through a slot or mortise in the beam, A, and is held in position by a clamping-bolt, D, which passes transversely through the slot or mortise near the brace-bar, so as to clamp it in any required position, and thereby adjust the tooth in any inclination, at the same time allowing it to yield to immovable obstacles without breaking. It is further stated in the specifications that "it is evident that, in a device thus constructed and operating, the brace-bar, C, can be so clamped

that the tooth will retain its position when working in arable soil, but will yield when coming in contact with an immovable obstacle, and pass over it without breaking; the shank turning back upon its pivot, and the brace-bar being forced up through the slot."

The invention being thus described, what is claimed as new and desired to be secured by letters patent is the "combination of the slotted beam, A, shank, B, brace-bar, C, and bolt, D, when the parts are constructed and arranged to operate as and for the purposes herein specified."

The device patented to J. H. & J. W. Thomas, and which the defendants are selling, consists of a wooden bar or beam having a slit in the rear end to receive the shank of the shovel or tooth. The shank and the tooth consist of one piece of metal, the shank at its upper end being of curved form, and secured in the slit by a bolt or pivot. Another threaded bolt is passed through the beam or drag-bar, a little in the rear of the bolt to which the shank of the tooth is fastened, and in such place as to sustain the tooth or shovel when in proper position. It is stated in the specifications of the patent that the ends of the bifurcated bar or beam are drawn down by the threaded bolt which sustains the tooth or shovel when it is in position, or by the united action of both the bolts mentioned, "until clamped against the standard of the shovel with such force that the friction shall maintain the shovel in position while passing through mellow earth, but not so tight but that it will yield to an excessive resistance before force enough is applied to break the shovel." It is further stated that by making the shank in one piece its construction "is greatly cheapened as compared with that class where an arm has to be welded to the shank;" and the substance of the patentee's claim is, in combination with the drag-bar or beam, bifurcated at the rear end, the shovel standard, curved at its head and where it is adjusted to the drag-bar, and pivoted and clamped by the bolts before described.

The only question which it is necessary to consider is that of infringement. The complainants' patent is for a combi-

nation. It is a settled rule of law that where a patent is for a combination of known parts, it is not infringed by the use of any number of the parts less than the whole; for the patent in every such case is for that identical combination, and nothing else, and a combination of any less number of parts is a different thing. *Sharp v. Tift*, 2 FED. REP. 697. This principle has been so often reiterated that it is elementary. *Prouty v. Ruggles*, 16 Pet. 336; *Lee v. Blandy*, 2 Fish. 89; *Latta v. Shawk*, 1 Fish. 465; *Gould v. Rees*, 15 Wall. 187. There is, however, another class of combinations, where some of the parts are new and others old, and where the new parts are claimed as inventions. If the combination is of this character, the appropriation of the part which is new is an infringement. *Latta v. Shawk*, *supra*; *Lee v. Blandy*, *supra*; *Sharp v. Tift*, *supra*. The complainants claim that their patent falls within the latter class. They insist that the slotted wooden beam used for the purposes designated in their combination is a new invention in and of itself, and that as the defendants use such a beam they infringe. It may be, and in fact the testimony tends to establish, that a slotted wooden beam was not used before complainants' patent for holding cultivator teeth. But this is not enough to make it a new thing within the rule last above stated. As matter of fact, a beam containing a slot or mortise, such as that in the complainants' device, is old, and the most that can be rightfully claimed in that respect is that an old and well-known part or thing is applied to a new use as part of a patented combination. Furthermore, the complainants do not in their specifications or claim allege that they are the inventors of the slotted beam, nor of anything less than the entire combination. And it is conclusively settled that where a patentee claims as his invention only the combination which he describes, the separate parts which constitute the combination are to be regarded as old, or common and public.

In *Rich v. Close*, 4 Fish. 282, it was said, by Judge Woodruff, that "an inventor must be taken to know of what his invention consists, and his patent does not secure to him the exclusive right in anything more than he claims to have

invented. * * * Here the patentee has narrowed his claim by the use of terms which are express and clear: 'What I claim as my invention, and desire to secure by letters patent, is the combination of the wheel, constructed as hereinbefore described, with the spiral conductor, D, and tube, F, so as to get the full pressure of the water while the wheel is relieved of its weight, in the manner and for the purpose set forth.' He does not claim to have invented either of these parts separately, nor to have invented a useful combination of any two of the parts without the third. He may have invented each of them, but he has not obtained a patent for either of them. We are therefore left to the assumption that each was old, and that his specific combination alone was new."

In *The Corn-planter Patent*, 23 Wall. 224, it was held that "where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device or part of the machine, this is an implied declaration, as conclusive, so far as that patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this; but that will speak for itself. *So far as the patent in question is concerned, the remaining parts are old, or common and public.*"

These statements of the law, as thus expressed in the two cases cited, are exactly applicable to the case at bar. Here, as in *Rich v. Close*, the patentees have narrowed their claim by the use of clear and express terms: "What we claim as new, and desire to secure by letters patent, is the combination of the slotted beam, A, shank, B, brace-bar, C, and bolt, D, when the parts are constructed and arranged to operate as and for the purposes herein specified." Not having claimed to have invented either of the parts separately, and expressly claiming only a certain combination of parts as described, there is an implied declaration, as conclusive as if it were expressed, that the specific combination is the only part which the patentees regard as new, and that the several parts

of the combination are old. Upon the highest authority, it therefore conclusively appears, I think, that complainants are not in a position to claim that their slotted beam was of itself a new invention or discovery. And, as before stated, it is not enough to say that it was not before used for holding cultivator teeth; for it cannot be reasonably claimed that the mere application of an old thing to a new use in a combination is such invention of a new part as would bring the case within that class of combinations where the appropriation of a single part is an infringement. But it is contended that the slotted beam is the distinctive and essential feature of complainants' invention, and should be regarded as such in passing on the question of infringement. The court must, however, look at the entire specifications and claim of the patentees, in determining what their invention is. The combination is an entirety. Unless it is maintained as such the whole of the invention fails. If one of the elements is given up the thing claimed disappears. Where a patentee, suing for an infringement, declares upon a combination of elements which he asserts constitutes the novelty of his invention, he cannot abandon a part of such combination and maintain his claims to the rest. Much less can he prove any part of his combination immaterial or useless. *Vance v. Campbell*, 1 Black, 427. The different parts may perform more or less important functions, but each and all are essential to make the thing which the patentee has claimed as his invention.

It follows, from what has been stated, that the defendants do not infringe the complainants' patent by merely using the slotted beam. They do not infringe unless they have appropriated the entire combination. The patentees declare in their specifications what their invention is. They expressly say, *inter alia*, that it consists "*in applying to the shank of the tooth a curved brace-bar, the upper end of which passes through a slot or mortise in the beam.*" The defendants use the slotted beam, the shank of the tooth, and the clamping bolt. But in their device there is no brace-bar welded to the shank, and passing up through the mortise in the beam.

Both parties use the pivot which attaches the shank to the beam; but this pivot is not claimed by the complainants as part of their invention. As, therefore, the construction of the defendants' device does not include the curved brace-bar, if the case were to stop here it would seem that the patentees' entire combination is not appropriated, and so that there is no infringement. But it is insisted that the difference between the two devices is one merely of form, and that in fact all the elements of the complainants' machine are present in that which the defendants are selling. There is no doubt of the right of a patentee to invoke the doctrine of equivalents on a question of infringement in the case of a combination patent. The law upon this subject is settled in *Conner v. Roach*, 4 Fish. 12; *Seymour v. Osborne*, 11 Wall. 516; and in *Gould v. Rees*, 15 Wall. 187. In the case of *Seymour v. Osborne* the court say that "mere formal alterations in a combination * * * are no defence to the charge of infringement, and the withdrawal of one ingredient from the same, and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination, if the ingredient substituted performs substantially the same function as the one withdrawn." But the court further say that to constitute infringement all the material ingredients of the prior combination must be appropriated, and that the inventors of a combination "cannot suppress subsequent improvements which are substantially different, whether the new improvements consist in a new combination of the same ingredients, or of the substitution of some newly-discovered ingredient, or of some old one performing some new function not known at the date of the letters patent as a proper substitute for the ingredient withdrawn." And in *Gould v. Rees* the court say: "*Bona fide* inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements. * * * Apply that rule and it is clear that an alteration in a patented combination which merely substitutes another old ingredient for one of the ingredients in the patented combination, is an infringement of

the patent if the substitute performs the same functions and was well known at the date of the patent as a proper substitute for the omitted ingredient; but the rule is otherwise if the ingredient substituted was a new one, or performs a substantially different function, or was not known at the date of the plaintiff's patent as a proper substitute for the one omitted from his patented combination. Where the defendant, in constructing his machine, omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe; and if he substitutes another in the place of the one omitted, which is new, or which performs a substantially different function, or if it is old, but was not known at the date of the plaintiff's patent as a proper substitute for the omitted ingredient, then he does not infringe." See, also, *Gill v. Wells*, 22 Wall. 1.

It follows, therefore, from these statements of the law, that if the defendants omit entirely one of the elements of the complainants' combination without substituting any other, or if they substitute another which is new, or which performs a substantially different function, or if it is one that is old, but was not known at the date of the complainants' patent as a proper substitute for the omitted ingredient, or if their machine consists in a new combination of the same ingredients, then the defendants do not infringe. A material ingredient of complainants' device is the curved brace-bar, welded to the shank of the tooth. This cannot be denied. If the defendants, omitting the brace-bar, have substituted an element in its place, that substitution consists not in supplying by physical addition another part, distinct from the rest of the device, in the place of that omitted, but in merely changing the form of the head of the shank where it rests in the mortise in the beam. In the complainants' device the curved brace-bar is welded to the rear of the shank about midway between the point where the shank is pivoted to the beam and the tooth, and passes into the mortise at the end of the beam, where it may be clamped. As before stated, the tooth and shank of defendants' device consist of a single piece of metal; the head of the shank, where it passes

into the mortise at the end of the beam, being curved, and resting on the clamping bolt at proper distance from the point where it is pivoted to the beam. Is the curved form of the head of the shank the equivalent of complainants' brace-bar, in the sense of the authorities cited? It was argued that the word "brace," as used in complainants' specifications, has reference to the functions of an arm, or an enlargement of the upper portion of the shank of the shovel, and that the curved head of the standard or shank in the defendants' device, lying within the mortise, operates as an arm, and secures the same leverage or frictional power as does the complainants' brace-bar. Whether this feature of complainants' combination be called a brace or an arm, there can be no question of the function it is intended to perform. It is not only to be clamped in the slot in the beam so as to hold the tooth securely in working position, but it is evidently intended to strengthen the shank below the beam so as to prevent it from bending or breaking when in operation, which is one of the primary functions of a brace. The complainant John S. Rowell testifies that the brace thus welded to the shank between the tooth and the beam stiffens the shank, and allows the use of a lighter material for the shank than could otherwise be used. It operates as a support, which it would seem removes the terminal strain from a point immediately below the beam to a point midway or below the center of the shank. This function of the brace is not found in the construction of defendants' machine, for it is evident that, as it is constructed, the strain terminates on the shank at the point where the shank is clamped. So that while it may be said that frictional resistance or leverage between the pivoted point and the clamping bolt is obtained in both devices, it is observable that the complainants' brace performs a function that is omitted in the defendants' machine. It affords support to the shank, strength to the structure, and the suitable term, "brace-bar," is used in complainants' specifications as expressive of power of resistance. And it is, therefore, not difficult to understand, as some of the witnesses have testified, why the complainants' device is recognized by the public as the

"brace-tooth," and as capable of greater resistance, and less liable to bend or break than the defendants' machine.

Then, I think, there is force in the claim that the curved part of the shank lying within the beam in defendants' device performs a function not found in complainants' combination. The curved head rests on the clamping bolt, so that thereby all the teeth may be adjusted to a line. The function of alignment is thus secured, and, by this arrangement of the parts, the bolt on which the head of the shank rests becomes not only a clamping device but an aligning bolt. Furthermore, it is quite apparent, from an examination of the models, that in the operation of the defendants' machine, when, for example, the team is backed, the pressure does not move the teeth out of position, because the clamping bolt on which the curved head of the shank rests operates as a stop and prevents any forward movement of the teeth; whereas, in complainants' device, it is evident that if the brace is not set so tightly in the mortise that it cannot escape, it might, in backing, be drawn entirely out, and the teeth would be pressed forward, with nothing to operate as a stop except the pivot which fastens the shank to the beam, and with a liability that as the machine should be started forward its movement might be such as to cause the brace to catch on the beam, or to prevent it from passing directly back within the slot or mortise.

From what has been said, and without further elaboration, it would appear that the claim made by defendants is not without reason to support it, namely, that in their device they omit the brace-bar and do not substitute for it an element which wholly performs the same function; that, therefore, their substituted element, if there is one, is not an equivalent, because, "by an equivalent in such a case it is meant that the ingredient substituted for the one withdrawn performs the same function as the other." *Gills v. Wells, supra*. Further, that in the construction of their device a new element is introduced which performs a function substantially different from that which the complainants' device was designed to perform, (see *Babcock v. Judd*, 1 FED. REP. 408;) and, in short, that the defendants' combination is a new arrangement

of parts so different from the complainants' as not to be the equivalent, within the principles applicable to combination patents.

There is considerable similarity, at least in the application of principles, between this case and the case of *Prouty v. Ruggles*, *supra*. Adopting the language of the court in that case, it may be well said here: "None of the parts referred to are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all arranged and combined together, in the manner described, And this combination, composed of all the parts mentioned in the specifications, and arranged with reference to each other * * * in the manner therein described, is stated to be the improvement and is the thing patented. The use of any two of these parts only, or of two combined with a third which is substantially different in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

Certain models were prepared and submitted by one of the expert witnesses, as illustrating the supposed identity of the two devices in question, but I do not think they demonstrate such identity. The structural arrangement of the parts in the two machines is substantially different. The brace-bar is a distinct member of the complainants' combination. They have claimed it in their specifications to be an essential part of their invention. It is the construction of the several parts, not separately, but in combination, which they claim to be new, and their improvement consists in arranging different parts of the cultivator, and combining them together in the manner stated in the specifications, for the purpose of producing a certain effect. *Prouty v. Ruggles*, *supra*. Applying to the case what I conceive to be correct legal principles, my conclusion is that the defendants do not infringe the complainants' patent.

Let the bill be dismissed.

THE SCHOONER JEFFERSON BORDEN.

(District Court, D. Delaware. February 19, 1881.)

1. ADMIRALTY JURISDICTION—U. S. COMMISSIONER—REV. ST. § 4546.

In the absence of the district judge from his place of residence, where the same is within three miles of the place where a vessel is moored, the jurisdiction conferred upon him by section 4546, U. S. Revised Statutes, may be exercised by a United States commissioner.

2. SAME—SAME—SAME.

He should satisfy himself of the absence of the district judge from his place of residence, and, having once assumed jurisdiction, the court will not go behind his certificate of "probable cause," but will assume that, as he is acting as a public officer, the principle, "*omnia presumuntur, esse acta rite*," will apply to his conduct, and that he has not usurped jurisdiction that does not belong to him.

3. SEAMEN—WAGES—DISCHARGE.

Seamen not allowed wages upon days when they wrongfully refuse to work or obey orders.

What facts will constitute a discharge of seamen.

In Admiralty.

In the matter of seamen's wages, for which a libel has been filed and proceedings taken in this court against the schooner Jefferson Borden.

John C. Patterson and Charles G. Rumford, for libellants.

William C. Spruance, for respondent.

BRADFORD, D. J. This case was certified into this court by S. Rodmond Smith, a United States commissioner for this district, under the provisions of section 4546 of the Revised Statutes of the United States. I do not agree to the proposition of the counsel for the respondent, that the United States commissioner was guilty of usurpation of authority in hearing this case. While by the terms of the act of congress the district judge of the United States for the judicial district where the vessel is, is primarily charged with the duty of hearing these cases if his residence be within three miles from the place where the vessel is; yet, if he be absent from his place of residence, jurisdiction is without doubt given by the act of congress to any commissioner of the

circuit court in the district to hear and dispose of the case in the manner pointed out by law. It is true, the commissioner is bound to inform himself of the absence of the judge from his place of residence, but the court will not go behind his certificate in that matter. Indeed, the court is not certain that the certificate of the commissioner should show affirmatively the absence of the judge from his residence. It does not appear in the form prepared by Benedict, now a distinguished admiralty judge, and formerly a United States commissioner; and it would further appear that this being the action of a United States official, that the maxim *omnia presumuntur esse acta rite* should apply to his action. In point of practice these cases are almost universally tried before a United States commissioner, and not before the judges. In a maritime district the volume of this class of business requiring summary disposition is so great, if this duty was put on the judge it would seriously interfere with the proper discharge of more important ones. I have said thus much to relieve the United States commissioner from the implied censure in the remarks of the defendant's proctor.

1. The only practical question for the consideration of the court is, are these libellants entitled to any, and if any, what wages?

2. And to determine this question it becomes necessary to settle another one, and that is, were these libellants unjustly and improperly discharged from the ship?

It is denied by the respondent that these seamen were discharged at all. He swears that they left against his wishes; that by prolonged absence they became, in contemplation of law, deserters, and he actually took proceedings to have them arrested as such. The four libellants all unite in swearing that they were discharged, or that they were ordered to go ashore. And they are corroborated in this statement by the oaths of three stevedores, impartial witnesses, working at the time on or near the Jefferson Borden. So that if oath is to be placed against oath, the court would have to believe the libellants' story the true one. But there is no such rule of

evidence. It is difficult to determine this question, but as a result of all the evidence on this point the court thinks that Captain Patterson, master of the Jefferson Borden, did tell the crew to go ashore; that he did it in anger; and that the crew so understood him. The time and the manner in which they left the vessel is consistent with this view of the case. The court thinks this fact is established, but it does not believe that the captain intended thereby to discharge his crew. His own conduct is inconsistent with such a theory; for he made provision for their return, both as to food and lodging, and after the space of 48 hours, after their absence from the vessel, he took proceedings to have them arrested as deserters, in which he must have known he could not succeed if he had voluntarily discharged them.

It is evident to the court, from all the testimony in this cause, that these libellants—two of them in particular, George Henry and Edward Brown—were insolent, lazy, and disobedient to orders; and while their conduct did not amount to mutiny, it would have been full justification in the captain discharging them from his ship. It does not follow, therefore, that, if they were discharged, they are entitled to claim pay for the time or times they neglected to perform the duty; for in section 4528 of the Revised Statutes of the United States congress evidently intended that no seaman neglecting to do his work should receive pay for that period, and in pursuance of that section the court feels compelled to disallow the wages of these seamen during the time of their neglect to work. Henry was absent on Sunday all day, Monday until near sundown, and refused to work on Tuesday, Wednesday, and part of Thursday, and his wages for those days will be disallowed. The other three libellants refused to work on Tuesday, Wednesday, and Thursday, and their wages will be disallowed for those days.

The court will not allow the \$17 claimed for the four seamen by the amended libel as one month's extra wages, under section 4527, because it thinks that such discharge was "not without fault on their parts."

This cause ought to have been settled, if possible, under the provisions of section 4547; and it appearing that there is a small balance due those seamen, the costs will have to go against the schooner.

REED v. WELD and others.

(District Court, D. Massachusetts. ———, 1881.)

1. DEMURRAGE—SUSPENSION OF VOYAGE.

It is not to be supposed, upon libel for demurrage, in the absence of an express agreement, that a master intended or was expected to suspend his voyage, and wait an indefinite period of time before proceeding to complete it, while the consignees were engaged in finding a purchaser for the cargo.

2. SAME—LAY DAYS—STIPULATION AS TO TIME AND PLACE.

When parties stipulate that lay days shall count from a certain time, at a certain place, and another place is afterwards substituted, the term, as to time, applies to the substituted place, there being no agreement to the contrary.—[Ed.]

In Admiralty. Libel for Demurrage.

Hale, Walcott & Perkins, for libellant.

E. B. Callender, for respondents.

NELSON, D. J. This is a libel for demurrage. The libellant is the master of the schooner *Mary H. Stockham*, and on the eighteenth of March, 1879, received on board his vessel at Elizabethport, N. J., a cargo of 376 tons of coal, consigned to the respondents at Boston. By the terms of the bill of lading the master undertook to deliver the coal to the respondents or their assigns, "above three bridges, South End, Boston, they paying freight for the same at the rate of \$1.50 per ton, and 3 cents per ton bridge money, *demurrage as per new bill of lading*." The demurrage clause, in what is known in the coal trade as the new bill of lading, is as follows: "And 24 hours after the arrival at the above-named port, and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal

holidays excepted, for every 100 tons thereof; after which the cargo, consignee, or assignee shall pay demurrage at the rate of eight cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of cargo, as per this bill of lading, for each and every day's detention, and *pro rata* for parts and portions of a day beyond the days above specified, until the cargo is fully discharged, which freight and demurrage shall constitute a lien upon said cargo."

The vessel arrived at Boston, below the bridges, during the night of Monday, March 24th. On Tuesday morning, as she was about to proceed through the first bridge to the South End, she was stopped by an order from the respondents to report to them before going through the bridges. After receiving this order the libellant went ashore, and called on the respondents at their place of business, and was then told that their wharf at the South End, above three bridges, was full, and he would have to wait before discharging his cargo until they could sell the coal. The respondents at that time noted upon the master's copy of the bill of lading the arrival of the vessel, as follows: "Captain reported March 25th, 7:30 A. M.," that being the time of the arrival of the vessel at the lower bridge. On the following day, Wednesday, the respondents sold the coal, and after some negotiations with the libellant it was agreed that he should deliver the coal to the purchaser at Warren's wharf, above seven bridges, at the North End, the respondents agreeing to pay an additional rate of three cents a ton for each of the seven bridges. On the same day the libellant proceeded with his vessel to Warren's wharf, arriving in the evening at about 9. Another vessel was then unloading at the wharf, and it was not until the afternoon of Friday that he finally got in and commenced discharging, and he finished on the following Monday, March 31st, at 11 A. M., using due dispatch. During the negotiations nothing was said by either party as to demurrage.

I cannot assent to the view taken by the respondents, that by this arrangement the parties substituted the point above seven bridges, at the North End, as the termination of the

v.6,no.3—20

voyage, in place of that fixed by the bill of lading. I am of the opinion that the effect of the transaction was to terminate the voyage below the bridges. This is shown by the indorsement by the respondents on the master's bill of lading of the arrival of the vessel on the 25th, at 7:30 A. M., as well as by all the circumstances of the case. It is not to be supposed, in the absence of an express agreement, that the master intended or was expected to suspend his voyage, and wait an indefinite period of time before proceeding to complete it, while the respondents were engaged in finding a purchaser for the cargo. The libellant had the undoubted right to complete the voyage, and, if detained after his arrival beyond the stipulated lay-days, to rely upon his demurrage contract for compensation. When parties stipulate that lay-days shall count from a certain time, at a certain place, and another place is afterwards substituted, the term, as to time, applies to the substituted place, there being no agreement to the contrary. *Macl. on Ship.* (2d Ed.) 493. The lay-days began to run Tuesday, March 25th, at 7:30 A. M., and expired Monday, March 31st, at 1:30 A. M. This leaves an interval from the expiration of the lay-days to the time when the discharge was completed, 11 A. M., of nine and one-half hours. By the rule provided in the bill of lading, the demurrage for this detention amounts to \$7.74, and this sum the libellant is entitled to recover.

Decree accordingly.

THE FARNSWORTH.*

(District Court, E. D. Pennsylvania. February 21, 1881.)

1. COLLISION—GROUNDING OF SHIP IN TOW OF TUG—LIABILITY OF TUG FOR ACCIDENT CAUSED BY ITS NEGLIGENCE—DUTY TO ANCHOR IF UNABLE TO PROCEED SAFELY.

A tug, with a ship in tow, was approaching a sharp curve in a river with an ebb tide sweeping across from the east. Seeing another tow ahead going in the same direction the tug slackened her pace. The ship shortly afterwards grounded on the western shore. *Held*, that as it appeared from the evidence that the accident was caused by the slow pace of the tug, and her failure to keep to the eastern side of the channel, she was liable for the damage. *Held, further*, that if the vessels ahead could not have been passed at that point, and it was necessary to slow down to a pace not sufficient to afford proper steerage way to the ship, the master of the tug should have considered the propriety of dropping anchor.

Libel by the master of the ship Josephine against the tug Farnsworth, to recover damages caused by the grounding of the ship while being towed by the tug. The accident occurred June 25, 1880, while the ship was being towed by the tug up the Schuylkill river. The vessels were approaching a curve in the river, and just ahead was a tow of canal-boats bound in the same direction. The tug slackened her pace and shortened the hawser with which the ship was being towed, and shortly afterwards the ship grounded. The other facts are sufficiently stated in the opinion. The theory of libellant was that the accident was caused by the tug keeping too near to the western shore, and attempting to round the curve with the ship in tow on a slack hawser. The theory of respondents was that the accident occurred through the failure of the ship to obey the signals of the tug and to steer in her wake.

Alfred Driver and J. Warren Coulston, for libellant.

H. C. Brown and Edward F. Pugh, for respondents.

BUTLER, D. J. It is not difficult to ascertain the cause of grounding. Approaching a sharp curve in the river, where the ebb tide sweeps across from the east, the tug ran up the western side of the channel at a pace scarcely suffi-

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

cient to tighten the hawser, or afford "steerage way" to the ship, and the current consequently swept her ashore. The allegation that the ship was mismanaged by those on board, is not sustained by the proofs. The witnesses having the best opportunity of knowing, say the crew of the ship did all that could be done to keep her afloat. The very short distance between the tug and the ship, when the latter grounded, shows conclusively, that the former was well over to the western side of the channel, (her officers testify that she was west of the center,) while the condition of the tide made it important to keep to the eastern side. The failure in this respect, and the very slow pace at which the tug moved, produced the disaster. If vessels were ahead, which could not be passed at that point, and should not be overtaken, as is alleged, and the pace was not sufficient to afford proper steerage way to the ship, and enable her to keep in the wake of the tug, the master of the latter should have considered the propriety of dropping anchor, and waiting till the course was clear.

A decree must therefore be entered for the libellant accordingly.

THE ARTURO.

(Circuit Court, D. Massachusetts. January 18, 1881.

1. TUG AND TOW—WHEN TUGS ARE JOINTLY LIABLE—USAGE OF PORT.

Two tugs, belonging to different owners, engaged to tow a vessel under a general order for towage given by the master through other persons, while in command of the master of the tug first engaged, in accordance with the usage of the port, negligently landed the vessel while in tow upon a well-known shoal. *Held*, that both tugs were liable for the damages sustained by the vessel.—[Ed.

In Admiralty. Damage.

On the morning of the twenty-fourth of February, 1879, the Italian barkentine Arturo was lying at the pier of the Grand Junction wharf, in East Boston, known as No. 5, or the Elevator pier, where she had received her cargo, and was

soon to proceed to England; but, being notified that her berth was wanted, her master desired to be towed to the wharf of the Eastern Railroad Company, which lies up the harbor in a north-westerly direction.

A channel suitable for all classes of vessels has been dredged to the Grand Junction wharves; but to the southward and eastward there is comparatively shoal water.

The Arturo was heading up the dock, and to take her to her destination it was necessary that her head should be turned after she should come out of the dock, or while she was coming out. Two tugs, the J. C. Cottingham and the Nabby C., belonging to different owners, fastened to the barkentine, one on each quarter, and backed her out of the dock. A very fresh wind from the north-west and a strong ebb tide were constantly setting her towards the bank or shoal water above mentioned, and she grounded there almost immediately after leaving the dock, and sustained the damage complained of. The district court pronounced both tugs to be in fault. The J. C. Cottingham did not appeal. The question in this court was whether the Nabby C. was chargeable.

There was evidence tending to show that the consignees of the Arturo had another Italian ship to be moved that morning, and asked Mr. Sargent, a shipwright, to procure her to be towed. Mr. Sargent had some interest in the J. C. Cottingham, or in her employment. He spoke to Mr. Sprague, who was agent for the tug Salem, and it was understood between them that this first vessel, the Danielo, should be moved by those two tugs. On returning to the consignee's office, Mr. Sargent met the master of the Arturo, who asked him to procure towage for that vessel. Mr. Sargent went again to Mr. Sprague, and asked him to have the Arturo towed as soon as the towage of the Danielo was finished. Mr. Sprague procured Captain Chase, master of the J. C. Cottingham, to go to the Danielo, and to notify the Salem to assist him; all which was done, and the Danielo was moved by those two tugs. Captain Chase understood that the Salem was to assist him with the Arturo, but there was another engagement for her, and Captain Scollay, of the Nabby C.,

went, at Mr. Sargent's request, to assist the J. C. Cottingham, which had already gone over to Grand Junction wharf.

When the Nabby C. arrived at the pier 5, she made fast, as directed by Captain Chase, who took command of all three vessels, and gave orders to back the tugs. The captain of the Nabby C. obeyed all the orders of Captain Chase.

There was evidence of a usage in the port of Boston that the tug first spoken to "had the job;" that is, the right to conduct the navigation. And one witness testified that if the owners of the tugs were different, those who received the order, or the first order, sent in the whole bill. He added, that if it came to a lawsuit, he understood that each stood on its own bottom. The master of the Arturo had given a written order, but it was written in Italian, and the witnesses could not give its contents; they understood it to be a general order for towage, not specifying the number of tugs or their names.

C. T. Russell and C. T. Russell, Jr., for libellants.

Tugs are bound to care and diligence, and to know the currents and shoals of the harbor in which they ply, and their own ability to do the work. *The Margaret*, 94 U. S. 494; *The Express*, 3 Cliff. 462; *The Trojan*, 8 Ben. 498; *The Niagara*, 6 Ben. 469. The burden of proof is on them to show that there was no negligence. *The Webb*, 14 Wall. 406; *The Belknap*, 2 Low. 281; *The Clover*, 1 Low. 342; *The Workman*, Id. 504. See, on both points, *The Lady Pike*, 21 Wall. 1; *The New Philadelphia*, 1 Black, 62; *The Zouave*, 1 Brown, Adm. 110; *Trans. Line v. Hope*, 95 U. S. 297; *Smith v. St. Lawrence Co.* L. R. 5 P. C. 313; *The Armstrong*, 1 Brown, Adm. 130; *The Austen*, 3 Ben. 11; *The Morton*, 1 Brown Adm. 137; *The Mohler*, 21 Wall. 230; *The James A. Wright*, 3 Ben. 248; *The U. S. Grant*, 7 Ben. 337; *Hays v. Paul*, 51 Pa. St. 134.

The Nabby C. was employed by the bark, and was not the mere servant of the J. C. Cottingham. Recovery can be had in admiralty against an offending thing, without regard to ownership or agency. *The Ticonderoga*, Swabey, 215; *The Ruby Queen*, Lush. 266; *The May Queen*, 1 Sprague, 588;

The R. B. Forbes, Id. 328; *The Rescue*, 2 Sprague, 16; *The Carolus*, 2 Curtis, C. C. 69.

The duty of the tug not to injure the tow does not arise out of the towage contract, but is imposed by law. *Phila. & Reading R. Co. v. Derby*, 14 How. 468; *The Clarita & Clara*, 23 Wall. 1; *The Quickstep*, 9 Wall. 665; *The Deer*, 4 Ben. 352.

J. C. Dodge and *W. W. Dodge*, for the claimants, appellants.

The modern rule of the admiralty, in cases of damage by a vessel in tow, is that the vessel whose master is actually guilty of negligence shall respond. *The John Frazier*, 21 How. 184; *Sturges v. Boyer*, 24 How. 122; *The Maria Martin*, 12 Wall. 31; *The Mabey & Cooper*, 14 Wall. 204; *Sproul v. Hemingway*, 14 Pick. 1. They also referred to some of the cases cited by the libellants.

By the usage of the port the Nabby C. was under the absolute control of the master of the *J. C. Cottingham*, and his tug alone is responsible for his negligence.

Vessels coming to a port are bound by and presumed to know its usages. The libellants, therefore, knew that their implied contract, if they had one, with the Nabby C., was merely that she should assist and act under the orders of the other tug. *Goodenow v. Tyler*, 7 Mass. 36, 46; *Dwight v. Whitney*, 15 Pick. 179, 183; *Benson v. Schneider*, 7 Taunt. 272; *Cuthbert v. Cumming*, 10 Exch. 809; affirmed, 11 Exch. 405.

LOWELL, C. J. The careful collection of authorities by counsel will save me the necessity of citing them. They do not decide the precise question of this case. Two tugs, belonging to different owners, are sent to tow a vessel under a general order for towage given by her master through other persons. If the owners of the tug first spoken to undertook to do the work, or cause it to be done, they may be regarded as the sole contractors, bound by their undertaking to see that it is properly done, and they would be personally liable for any negligence, defect in machinery, disobedience of orders, or whatever else, on the part of either vessel, may have caused

the damage. Under the statute for limited liability, (Rev. St. § 4283,) it might be impossible to recover the whole loss; but to the extent of the value of the tugs there would be a remedy *in rem*. The ownership of the tugs would not be material, except as regards the limitation of personal liability. If the tugs were owned, borrowed, or hired by the contractor, their liability *in rem* would be the same. If, then, it were proved that the J. C. Cottingham hired the Nabby C., as alleged in the answer of the appellants, it would not, in my opinion, exempt their tug.

Upon the evidence as I understand it, however, the J. C. Cottingham did not undertake to do the work and furnish all necessary assistance; Mr. Sprague, who acted for the ship, engaged both tugs. The transaction appears to me, as to the district judge, to be, in effect, several contracts for a joint operation. If, therefore, one tug was wholly in fault, as by a defect of her machinery or the like, she alone would be responsible. But for their joint action, so far as it conduced to the loss, I hold them to be jointly responsible. And that is this case.

If the usage of the port undertook to throw upon one tug the responsibilities of two or more, it would be void; but I do not understand that any such usage was proved. The usage is that the captain of the first tug has charge of the enterprise. Some one must have the sole authority, and it is as convenient and proper a rule as any other, that it should be that one who is first engaged. But this is only a rule of convenience, and what it does in respect to the tow is to make the master of No. 1 master, likewise, of No. 2. If Captain Scollay had any doubt of the competency of Captain Chase, the usage would not require him to serve. He might decline to work on those terms; but when he accepts the usage, in the particular case, he accepts a master for his vessel.

These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet. There is, therefore, an analogy between

the two classes of cases so close that the tow may sue in one proceeding for damage her own tug and a strange vessel with which there has been a collision.

If a ship in command of a pilot whom it was compelled to take, injures another ship through fault of the pilot, the ship is liable unless exonerated by statute. If charterers are owners for the voyage, and appoint the master and crew, the ship is still liable. If she were navigated by pirates, who had run away with her, she would, in my opinion, be responsible to the injured ship. If she is in tow, her liability does undoubtedly depend upon whether her master or the master of the tug commands the two vessels, if the negligence is that of the commander. This is a relaxation of the old doctrine of the liability of the vessel. But, even then, the ownership of the tug or tow is immaterial. I cannot doubt that the rule is the same as to two tugs, or any number. If the tow does not command, the tugs do, and they arrange between themselves how the navigation shall be conducted. The rights of third persons do not depend upon their ownership or command. I have taken for granted that there might be a still further relaxation as to any fault distinctly committed by one of them only.

If the case depends upon contract, I think the owners of each tug pledged her that no fault should be committed by her; if, upon general doctrines of admiralty law, which are, to some extent, independent of contract, the vessel actually in fault, through negligence in her mode of navigation, though the negligence is that of a temporary master adopted by usage, is liable.

There is no question that the navigation was so negligently conducted that, in broad daylight, with obvious conditions of wind and tide, the ship was landed upon a well-known shoal. There is none that Captain Chase should have taken a line to the wharf, or have provided, in some other of the modes suggested by the experts, for counteracting the effect of the wind and tide; nor that Captain Scollay's tug, without any fault of his, or his crew, aided to run the ship aground.

In this state of facts, both tugs are liable for the damage.

OLSEN and others v. SCHOONER EDWIN POST, her tackle, etc.

(District Court, D. Delaware. March 18, 1881.)

1. SEAMEN—WAGES.

While it is true as a general rule that seamen will not be entitled to wages until the voyage is completed, there are exceptions to it, and among them is the case of a vessel employed to perform certain work or duties in a specified locality, and not engaged in carrying freight from port to port.

2. SAME—SAME.

An agreement to pay them for six months' services on board the said vessel for wrecking purposes, although it may contain a proviso for its return to a specified port, will not deprive the seamen of wages at the expiration of the term for which they shipped.

3. SAME—SAME.

If the seamen remain longer on board performing faithful service, they will be entitled to pay for their additional services upon the basis of *quantum meruit*.

4. SAME—SAME.

A reasonable mode of determining that sum is to ascertain the wages mutually agreed upon between the parties during the continuance of their contract, and to adopt that rate for the additional services.

5. SAME—DESERTION.

Leaving the vessel in a place of security, selected by the captain for winter quarters, in order to obtain wages which had been repeatedly refused them, does not constitute desertion, so as to deprive the seamen of the wages earned.

6. SAME—WAGES.

Trivial depredation upon the ship's property does not of itself forfeit seamen's wages.

7. AMENDMENTS—Costs.

Amendments of mere form not going to the merits of the case, and not of such a character as to prejudice the respondent, will not entitle him to costs.

In Admiralty. Libel for Wages.

Upon motion of the libellants' proctor to confirm the report of the admiralty commissioner under the forty-fourth rule in admiralty.

Charles B. Love, proctor for libellants for the motion.

L. C. Vandegrift, proctor for respondents in opposition to the confirmation of the report.

BRADFORD, D. J. The libellants were shipped on board said schooner at the port of Philadelphia, on the Delaware, thence "bound from said port to the Delaware breakwater, and waters tributary to the Delaware river and coast of Maryland and New Jersey, to be engaged in wrecking, and back to Philadelphia, for a term of six months," as set forth in the shipping articles produced in evidence. It appears from the evidence they were all foreigners, and but imperfectly acquainted with the English language, and could neither read nor write the same. It also further appears by the evidence of the shipping master, Wilson, and by the testimony of the respondent Lubker himself, that the articles were explained to the men by said Lubker and Wilson to be a contract to pay wages for the term of six months, for working on said vessel in the business in which she was engaged; that is, wrecking in and about the harbor of Lewes, at the entrance of Delaware bay.

It is in evidence that the vessel never did in fact return to Philadelphia, and that all these seamen performed their duty faithfully for more than a period of six months; and that, after making several unsuccessful demands for their wages, finally left her in winter quarters, and in a place of safety, selected by the master of the schooner.

The respondents, however, claim that no wages whatever are due under the shipping articles until the voyage for which they shipped is completed by the arrival of the vessel at the port of Philadelphia, after six months from the date of shipment of the crew; and, further, that they had forfeited their wages by misconduct in opening a box of the master and taking three bottles of beer without leave; and, further, by leaving the ship in a position of danger and peril without the permission of the master.

The authorities cited by the respondent no doubt establish the position of the necessity of the completion of the voyage for which the seaman is shipped, as a condition precedent for the payment of the full wages due, unless the seaman is unjustly discharged by the master during the *interim*. There is no doubt of the applicability of this law to vessels carrying

freight from port to port, but the peculiar maritime services of this vessel must be taken in consideration in determining the law in reference to the completion of a voyage before wages are due.

The schooner Edwin Post was what is termed a wrecking vessel, whose business was giving assistance to vessels in distress, and the performance of general salvage services, etc. She could in no proper sense be said to be making a voyage from port to port, for the scene of her operations was altogether local, her headquarters being the breakwater, at the entrance of the Delaware bay. She was not engaged, as a usual thing, in carrying freight from port to port.

The court thinks the fair and reasonable construction of the shipping articles is that they constitute an agreement to give employment for the period of six months, at the rate respectively agreed upon between the master and seaman; and, while the master had the right to expect their services for that period of time, they were also entitled, in case of accident or improper discharge by the master, to have a *pro rata* share of their wages earned by them during their actual stay on the vessel and in his employ. There is no dispute about the time they were in the vessel, and that the full six months' wages were earned. But it is contended that, as there was in the shipping articles a provision, or rather an intimation, that the vessel was to come "back to Philadelphia" after the work was done, that her arrival at Philadelphia was a condition precedent to the right to have wages paid.

The court cannot take this view of the case. As before said, the getting back to Philadelphia was no essential portion of the work for which these men were employed. Its mention was a mere incident, and we think it was not intended that fact should determine the earning of wages in whole or in part. Any other construction would have put it in the power of the master to have kept these seamen for an indefinite length of time, and postponed the payment of their wages to the actual arrival of the vessel at the port of Phila-

delphia—a construction which would be oppressive upon the rights of the seamen.

It appears from the evidence that the seamen served on board the said schooner not only during the period of six months, but also for several months additional, which has been computed and included in the report of the admiralty commissioner in this case. The court is of opinion that they are entitled to this additional amount upon the basis of *quantum meruit*; and there is no more reasonable method of determining the amount due than by reference to the sum agreed by the master to be paid them for similar services immediately preceding, and which were satisfactory to both parties. These amounts will be accordingly added to the six months' wages earned. The court does not consider that the crew forfeited any part of their wages by the abstraction of a few bottles of beer on a very hot day, for which they offered payment to the captain. It no doubt was an offence against strict discipline on board ship, but was not of such a serious character as to forfeit wages, and particularly as the master exonerated these seamen from any other depredations on the ship's property during their stay on board. The court cannot accede to the proposition that those seamen forfeited their wages by desertion of the vessel in leaving her without assistance in a position of danger. The evidence in the case does not sustain such a conclusion; on the contrary, it shows distinctly that the libellants left her in a place of security for winter quarters selected by the master himself. They left her only for the purpose of obtaining their wages, which were long past due, and under such circumstances as the court thinks justified them in leaving without incurring the charge of desertion.

The report of the commissioner, fixing the amount of wages due each respective libellant, is hereby approved and adopted. Let a decree be entered accordingly. The costs in this case to be taxed are to be paid by the respondent. The court does not think that the amendments were of such a character as to prejudice the respondent to such an extent as to entitle him to costs. Where one party is so misled by

the pleadings of another as to take a course of action which otherwise he would not have taken, and the first party sees fit to amend, thus throwing the other party upon a new line of defence, then costs ought to be imposed upon the party amending; for *non constat*, if the original pleading had been the same as the amended one, that the defendant might have defended at all, or taken a less troublesome and expensive line of defence. We do not see that the respondent has been damnified by the amendment to the libel to such an extent as to entitle him to costs. All the evidence shows that there was no wrongful presentation of the case as regards its substantial merits in the libel as filed originally.

Leaving out of view minor questions of date and form, to which extent the amendments to the libel only went, nevertheless the master refused to pay the wages of his seamen, which he admitted had been earned by their faithful and continuous labor for a period of over six months, if not forfeited for other causes. Thus it will be seen that the objection to amending the libel is not one going to the merits of the action. He is not entitled to have costs by reason of the amendment, and they must be denied.

THE BEN HOOLEY.*

(*District Court, E. D. Pennsylvania.* February 21, 1881.)

1. ADMIRALTY—TOWING VESSEL FROM PIER IN ORDER TO MOVE ANOTHER VESSEL—RESPONSIBILITY OF TUG FOR COLLISION CAUSED BY DEFECTIVE HAWSER.

A tug which, in order to move a vessel from a pier, moves another vessel into the stream against the protest of her officers, is responsible for a collision caused by the defective condition of the latter vessel's hawser, with which the towing is done.

2. SAME—EXTENT OF TUG'S DUTY—WHEN NOT RELIEVED BY NEGLIGENCE OF VESSEL IN TOW.

Two schooners were lying at a pier. A tug was employed to tow one of them out, and, in order to do so, undertook to tow the other

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

into the stream, against the protest of her mate, who was in charge. In doing this the hawser of the latter vessel broke, the breaking resulting in a collision with and damage to a vessel anchored in the stream.

Held, that the tug was bound to have ascertained whether the hawser was sufficient, and was responsible for the damage.

Held, further, that the tug was not relieved, because the schooner might have anchored after the first breaking of the hawser, and thus avoided the collision.

In Admiralty.

Libel for collision, by the schooner Galloway C. Morris against the steam-tug Ben Hooley. The facts are as follows : On November 3, 1876, the schooners Ella C. Little and Index were lying at a pier in the Delaware river. The Index employed the respondent tug to tow her into the stream, and in order to do so the tug undertook to first tow the Little into the stream. While doing this the hawser parted and the Little collided with and damaged the Galloway C. Morris, which was anchored in the stream. On behalf of the libellant it was alleged that the tug towed the Little into the stream against the protest of the latter's mate, and in doing so used the Little's hawser, after notice of the mate that it was rotten. On behalf of the respondent it was alleged that the mate of the Little refused to move his vessel, and was compelled to do so by the dock-master; that he then furnished a line to the tug, and the Little was towed out into the stream; that the hawser then parted, but it being a convenient place to anchor, those in charge of the tug requested the mate of the Little to let go her anchor; that he did not do this, and the tug then went along-side, again received a line from the Little, and attempted to tow her; that the hawser again parted, and the collision with the Morris resulted; that those in charge of the tug had no notice or knowledge of the defective condition of the hawser, and that if the Little had anchored after the first breaking of the hawser the collision would not have occurred.

Henry R. Edmunds, for libellant.

Alfred Driver and *J. Warren Coulston*, for respondent.

BUTLER, D. J. The liability of the respondent is plain. The loss resulted directly from his negligence. If he did not

know the rotten condition of the hawser, with which he attempted to move the Little, at the outset, (and the complainant's witnesses swear he did,) he became aware of it, according to the testimony produced by himself, immediately after. The result would be the same, however, if he did not know. Undertaking to move the vessel for his own convenience, against her protest, the responsibility for all that was done rested on him. It was his duty to ascertain whether the hawser was sufficient to control her. The failure to do this was the direct cause of the injury which followed. It is of no consequence that those on board the Little, might possibly have averted the catastrophe by dropping her anchor. As respects the libellant, the respondent cannot complain that somebody did not interfere to save him from the consequences of his folly. He took the Little, in charge on his own account, against her will, and as respects the libellant, was responsible for her management. If unfit to go out because of the condition of her anchors, or on any other account, he should not have taken her. The authorities cited by his counsel relate to questions between the owners of tugs and their tows, and have no application to the case in hand. It is doubtful at least whether the ordinary relation of tug and tow existed between the respondent and the Little; but even if it did, and both vessels might be regarded as in fault, the right of the libellant to recover from the respondent would not be affected thereby.

A decree must be entered for the libellant accordingly.

CITY OF PORTLAND v. OREGONIAN RY. Co. (limited.)

*(Circuit Court, D. Oregon. March 22, 1881.)***1. CAUSE REMOVED—INJUNCTION.**

Upon the removal of a cause to a circuit court, the same has power, before the first day of its next term, to allow or modify an injunction.

2. INJUNCTION.

Where a suit for injunction turns wholly upon the validity of an act of the legislature granting the defendant the exclusive right to the use of certain property, to aid in the construction and operation of its railway, which is claimed by the plaintiff as a public levee or landing, and the use of such property, in a way not materially in conflict with any use to which it is being put, is of great advantage to the defendant, an injunction restraining it from such use will be modified accordingly; and, in the consideration of the matter, weight will be given to the presumption that an act of the legislature is valid, and that the defendant is engaged in a public enterprise in which the public is interested.

3. BOND.

Upon the modification of an injunction the court may require, a condition of such modification, that the defendant give a bond to secure the plaintiff against any injury which may result to it from the same, or to perform the final decree concerning the same.

Julius C. Moreland, for plaintiff.

Ellis G. Hughes, for defendant.

DEADY, D. J. At the last session (1880) of the legislative assembly, an act was passed granting the defendant,—the Oregonian Railway Company, limited,—among other things, the use of the triangular-shaped piece of ground lying between the east line of blocks 112 and 113 of the city of Portland and the east bank of the Wallamet river, the same being, as appears from the map, about 520 feet long and 50 feet wide at the south end and 300 feet at the north end, and known as the "Public Levee," and dedicated to public use as a levee by a map and ordinance of the plaintiff—the city of Portland—recorded March 6, 1869, "to be held, used, and enjoyed for occupation by track, side-track, water stations, depot buildings, wharves, and warehouses," and such other "erections" as may be found necessary or convenient in the
v.6,no.4—21

shipping and storing of freight under the exclusive control of the owners of the railway then being constructed by the defendant from Portland to the head of the Wallamet valley; with a proviso, that the defendant should not sell or assign the premises otherwise than as an appurtenance to said railway, and that said grant shall be forfeited if said railway is not completed to the said premises before January 1, 1882; saving to the plaintiff "any pecuniary or property rights" which it may have in said premises "as a municipal corporation, and which the state may not lawfully appropriate in this act."

In pursuance of this act the defendant entered upon the premises and commenced to prepare the ground for the uses specified in the act. The plaintiff, claiming the act of the legislature to be in excess of its power, and therefore void, on January 31, 1881, commenced a suit in the state circuit court for this county, perpetually to enjoin the defendant from occupying or using the premises thereunder, and on the same day obtained an *ex parte* order for a temporary injunction, restraining the defendant as prayed for in the bill, which was served on February 2d, thereafter. Afterwards, on February 17th, the suit, on the petition of the defendant, was removed to this court, and the transcript filed herein on February 25th. On March 17th, the defendant filed a petition asking that the injunction heretofore granted be modified so as to allow it the use of the premises for a track and side tracks, to facilitate the construction of its road from Portland to the point where it will connect with the junction of the sections thereof already constructed between a point in Marion county and Brownsville, Linn county, on the east side of the Wallamet river, and Dayton and Sheridan and Dallas, on the west side, stating that it is the owner of the east part of block 71, lying immediately north of said levee, and has a wharf thereon for the loading and unloading of sea-going vessels; that the iron for constructing said railway must be imported in such vessels, and that if allowed the use of the levee as aforesaid, in connection with said block 71 and wharf thereon, it can receive and forward said iron at a great sav-

ing of time and expense; that no use is now being made of said levee, and that a track can be laid across it without interfering with the use of it as a levee, and without materially affecting the surface of the ground. On March 21st, the plaintiff showed cause against the application by the affidavit of its clerk, and the matter was argued by counsel.

There is no doubt of the power of the court to grant this petition at this stage of the proceedings; for, although the cause is not for trial or hearing in this court until the first day of the next term,—the second Monday in April,—yet it is in this court from the date of the removal, and such conservatory acts as the allowance or modification of an injunction may be had therein at any time thereafter. *Mahoney Mining Co. v. Bennett*, 4 Sawy. 289; *New Orleans City R. Co. v. Crescent City R. Co.* 5 FED. REP. 160.* The final determination of this case will turn upon the validity of the legislative act granting the use of the premises to the defendant.

The presumption is in favor of the validity of the act, and at this stage of the litigation this presumption ought to have weight. At least it will not do to assume that the act is invalid, but only that it may be so. There are no particular equities in the bill which the defendant must answer before it is entitled to a modification of this injunction. At best, it is only a suit to try the title of the defendant to property which is claimed to be subject to a public easement, and a preliminary injunction is only allowed to preserve the property for such use, in case it is determined that the defendant has no title thereto. Therefore the defendant ought not to be any further restrained, until the invalidity of its title is determined, than is necessary to preserve the property for the purpose to which the plaintiff claims it is devoted. The property is an unimproved piece of ground, of which no practical use has ever been made as a public levee or landing, and probably never will be, until it is improved by the erection of wharves and warehouses thereon. The business of loading and unloading vessels is not done in this country upon open quays or

*See, also, *In the Matter of the Petition of the Barnesville & Moorhead Ry. Co.*, 4 FED. REP. 10.

mud banks. The use of the property for laying and operating a track and side track thereon during the pendency of this suit, so as to enable the defendant to connect the construction of its road by rail with its wharf on block 71 aforesaid, and complete it in time to prevent a forfeiture of the grant, will work no possible harm to the plaintiff or public, and may be of much benefit to the defendant; for it seems that by the act the defendant must complete its road "to the said premises," or place "erections" thereon of the value of \$10,000, before January 1, 1882, or the grant is forfeited. On account of this injunction it cannot place the "erections" on the property, and, unless it is modified as suggested, it may not be able to comply with the other condition.

Indeed, there is but little reason for a preliminary injunction in this case at all. As has been said, the public is making no use of the property as a levee or otherwise, and cannot until it is improved; and if the defendant was even permitted to go on and build a depot thereon, as well as a track and side tracks, what harm would result to the plaintiff from it? If the final determination is against the defendant, it may be compelled to remove them, (*C. S. U. Co. v. V. & G. H. W. Co.* 1 Sawy. 482;) or, what is more likely, the plaintiff may keep the improvements as a part of its property and thereby gain what the other loses. Nor is there any suggestion that the defendant is insolvent, and unable to respond in damages for any injury it may cause to the property of the plaintiff. If this were a public levee or landing in fact as well as name, and the defendant was materially interfering with the public use of the premises by its proposed "erections" and "constructions," there would be ground for restraining it until its right to do so was finally determined. But, as it is, there is no public use to be disturbed, and the actual controversy is confined to the right of the defendant to the exclusive use of the premises; and their use by it in the meantime, in such a way as to cause no injury thereto, and at least not to materially interfere with the public use, if any, ought not to be restrained.

Again, in the consideration of this question, it ought not

to be forgotten that the speedy construction of the defendant's railway to a deep-water landing in this city is a public enterprise in which the public is interested. As such, the legislature has undertaken to encourage and promote its completion at an early day. On this consideration alone a court will be careful, in the exercise of the power of injunction before final decree, not needlessly or lightly to interfere with the progress of such an enterprise, or by delaying or impeding its construction for a season, deprive the community of the benefits that may be derived from it. Besides, the court has authority, in the exercise of this power, to take security against any injury which the plaintiff may sustain by reason of the acts permitted to the defendant. *N. P. R. Co. v. St. P., M. & M. Ry. Co.* 4 FED. REP. 692.

Let the injunction be modified so as to permit the defendant to construct and operate a track and side tracks over and upon the premises during the pendency of this suit; it first giving bond in the penal sum of \$5,000, with one or more sureties, to be taken and approved by the master of this court, conditioned that it will, upon the order of this court or upon the entry of a final decree in this suit against the right and claim of the defendant to the use of said premises under and by virtue of said legislative act, remove said track and side tracks from said premises, and leave the same in as good a condition for use as a public levee as they now are; or the defendant may deposit, in the registry of this court, United States bonds of the par value of \$5,000 as a security for the performance of said acts.

HATCH and another v. THE WALLAMET IRON BRIDGE Co.

(*Circuit Court, D. Oregon.* March 28, 1881.)

1. JURISDICTION.

A suit arises out of a law of the United States when the controversy involved in it turns upon the proper construction or application of such law; and therefore a suit by the owner of a vessel authorized to engage in the coasting trade upon the Wallamet river, and by riparian owners thereon, to enjoin the erection of a bridge over said river at Portland, as being in violation of the act of congress under which said vessel was enrolled and licensed, and the act of congress (11 St. 383) declaring said river a free and common highway, arises under said laws, whether the plaintiffs are entitled to the relief sought or not.

2. NAVIGABLE WATERS—CONTROL OF.

The power of congress to regulate commerce (Const. art. 1, § 8) includes, for the purposes of commerce, control of all the navigable waters of the United States which are accessible from a state, other than the one in which they lie; and, for this purpose, they are the waters of the nation, and subject to the legislation of congress in every particular affecting their navigability or use as instruments or means of commerce.

3. BRIDGES—NAVIGABLE WATERS.

The state has the sole power to bridge the waters within its limits, but this power is subject to the power of congress to prevent obstructions to navigation being placed in such waters within the state, and accessible from without it; and therefore, in the absence of legislation by congress to the contrary, a state may dam or otherwise obstruct the navigable waters within its limits at pleasure.

4. CONGRESSIONAL ACTION—CONSTRUCTION OF.

The acts of congress authorizing a vessel to engage in the coasting trade within a state are construed as not manifesting an intention upon the part of congress to interfere with the power of the state to obstruct the navigable waters within its limits, but only to authorize their navigation by such vessel for the purposes of such trade, so long as they are navigable.

5. SAME.

The provision in section 2 of the act of February 14, 1859, (11 St. 383,) admitting Oregon into the Union, which declares that "all the navigable waters of said state shall be common highways and forever free" to all the citizens of the United States, is paramount to a law of the state authorizing a bridge to be erected across the Wallamet river; and therefore, if such bridge as proposed to be constructed will materially impede or obstruct the free navigation of said river, it is unlawful, and the parties constructing it may be enjoined at the suit of riparian owners injured thereby.

6. INJUNCTION GRANTED.

A preliminary injunction granted to restrain the building of a bridge over the Wallamet, with a draw of only 100 feet on either side of the pivot pier, under the authority of an act of the state legislature authorizing the building of such bridge, with a good and sufficient draw of not less than 100 feet, upon evidence showing that such a bridge would materially obstruct the navigation of the river, because said act did not absolutely authorize a bridge with a draw of only 100 feet, and if it did it was in conflict with the act of congress of February 14, 1859, *supra*, declaring the river a free and common highway, and therefore it is void.

Suit in Equity for an Injunction. Motion for preliminary injunction.

Todd Bingham, E. C. Bronaugh, and Edward Bingham, for plaintiffs.

H. Y. Thompson and George H. Durham, for defendant.

DEADY, D. J. On October 18, 1878, the legislature of Oregon passed an act authorizing the "Portland Bridge Company," a corporation incorporated under the laws of Oregon, "or its assigns," to build a bridge, "for all purposes of travel or commerce," across the Wallamet river between Portland and East Portland, "at such point or location on the banks of said river" as it might select, "on or above Morrison street, of said city of Portland:" "*provided*, that there shall be placed and maintained in said bridge a good and sufficient draw, of not less than 100 feet in the clear in width of a passage-way, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge." On July 16, 1880, the defendant,—the Wallamet Iron Bridge Company,—as the assignee of said Portland Bridge Company, commenced the erection of a bridge across the river from the foot of Morrison street, in Portland, to N street, in East Portland. At this point the river is about 1,400 feet wide at extreme low water, with a depth of not less than 50 feet for 200 feet from the Morrison-street wharf along the line of the proposed bridge, whence it gradually shoals to 23 feet at a further distance of 250 feet. The river rises in the winter months from the rains, and in the spring is backed up by what is known as the June rise in

the Columbia. The highest water is 28 feet above low water, and during the past winter the rise was 21.6 above low water. The current in the ship channel along the line of the proposed bridge is nearly parallel with the direction of the opening between the piers, and varies in velocity from one to seven miles an hour, and at average high water is from three to four miles an hour. During the winter months strong southerly winds blow down the river for days at a time. The abutment pier is to be placed at the bank in front of the Morrison-street wharf, and the spaces between the next five piers are as follows: The first, 180 feet; second, a space on either side of the draw-pier of 100 feet each; and then two spaces of 200 feet each. The piers are constructed by driving piles inside of wooden cribs, and filling the spaces between them with loose stone up to a little below low-water mark, and above with iron tubes filled with concrete, except the draw-pier, which is to be of masonry above low water. The spans are to be of wood, except the draw, which is to be of iron. The lower chord is to be eight feet above high water. The five piers east of the western abutment are now above low water.

On January 3d the plaintiffs filed their bill in this court to enjoin the defendant from constructing this bridge, on the ground that the same is and will be a serious and unlawful obstruction to the navigation of the river. Among other things, the bill alleges that Lownsdale is the owner of an interest in wharves and warehouses on blocks 73 and 74 of Portland, on the west bank of said river,—a distance of about 600 feet above the location of said bridge,—of the value of \$10,000, and that the plaintiff Hatch is the lessee of the whole of said property for a term of years at a rent of \$700 per month; that a large portion of the commerce of the Wal-lamet valley has been done through and at said wharves and warehouses; that a large portion of the wheat raised in said valley has been received and stored there for shipment in sea-going vessels to foreign ports; that vessels carrying 2,000 tons can navigate the channel on the west side of the river for a distance of a mile above Morrison street, and therefore

that bank is now occupied by wharves and warehouses engaged in the commerce of the Wallamet valley, and other portions of the coast and Europe; that the space allowed for a draw in said bridge is too narrow to admit the passage of vessels with safety, and therefore they cannot and will not come to complainants' wharves to discharge and receive cargo, to their great and permanent injury; that the plaintiff Hatch is the owner of an enrolled and licensed steamboat—the A. A. McCully—which is employed in towing vessels to and from the wharves aforesaid upon the river aforesaid, and that the erection of said bridge with so narrow a draw-opening prevents the same from being done with safety, to his injury.

It appears from the affidavit of C. H. Gorril that he and his brother, B. W. Gorril, of California, are stockholders in the defendant corporation, and are engaged as contractors in the construction of the bridge; that they are to receive \$150,000 for the work, and are under bonds in the sum of \$20,000 to complete the same by April 1, 1882; that they have expended on the work \$50,000, including the purchase and preparation of the timber and lumber for seven of the eight spans, and all the iron for the same, and that if not restrained by this court they will complete the bridge by June 1st.

Section 1 of the act of March 3, 1875, (18 St. 470,) which, among other things, gives this court jurisdiction of a suit in equity arising under a law of the United States, includes this case.

Congress has power "to regulate commerce with foreign nations and among the several states," (Const. art. 1, § 8;) and this includes, for the purpose of commerce, the control of all the navigable waters of the United States which are accessible from a state other than that in which they lie. For this purpose they are the waters of the nation, and subject to the legislation of congress in every particular affecting their navigability or use as instruments or means of commerce. *Gibbons v. Ogden*, 9 Wheat. 1; *Penn. v. W. & B. Bridge Co.* 18 How. 431; *Gilman v. Philadelphia*, 3 Wall. 724.

In pursuance of this power to regulate commerce congress has provided (title L of the Rev. St.) that certain vessels, when enrolled and licensed as required by law, shall have the right to engage in the coasting trade; that is, the trade upon the navigable waters of the United States. The plaintiff Hatch is the owner of a vessel so enrolled and licensed for this district, and his contention is that this bridge will and does prevent the enjoyment of this right, and therefore this suit arises out of a law of congress, as applied to the facts and circumstances of the case.

Again, the act of congress of February 14, 1859, (11 St. 383,) admitting Oregon into the Union, provides (section 2) "that all the navigable waters of said state [Oregon] shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, toll, or impost therefor." Both the plaintiffs are riparian proprietors upon the stream over which this bridge is being built, and their contention is that it does and will obstruct the navigation of the river so as to prevent its being used as a common highway, to their injury as such proprietors, and therefore this suit arises out of a law of congress as applied to the facts and circumstances of the case.

To sustain jurisdiction under this clause of the act of 1875, *supra*, it is not necessary to show or assume that the plaintiffs are entitled to the relief sought, but it is sufficient if the controversy turns upon or grows out of the proper construction or application of these acts of congress, or either of them.

The power to authorize the erection of a bridge over a navigable water of a state, for the convenience of the inhabitants thereof, belongs to the state as a part of its general police power. Congress does not possess this authority directly, *eo nomine*; but its control over the navigable waters of the states, as a means of commerce, gives it a practical veto upon the power of the state in this respect. Therefore, no state can authorize or maintain the erection of a bridge over a navigable water, which in effect contravenes or conflicts with the law of congress concerning the navigation of the same; and the fact

that such water is wholly within the state is immaterial, if it is accessible from another state, or forms a part of a navigable way between itself and other states.

If, then, this bridge, in its construction or effect, is in conflict with either of these acts of congress, it is so far unlawful; and, if injurious in its operation to the rights of the plaintiffs, is a nuisance, and may be prevented or abated. But if it does not contravene such law, then, however it may inconvenience or obstruct the navigation of the river, this court cannot interfere. The power of congress to regulate the navigation of the river does not execute itself; nor can this court enforce it until congress has declared its will on the subject. Until then the power is dormant, and the authority of the state is sufficient to justify any structure or obstruction that may be placed therein.

In this case the defendant insists that it is building this bridge in pursuance of a law of the state, and that there is no law of congress upon the subject to the contrary, and therefore it is lawful. Does the law under which Hatch's steam-boat is authorized to engage in the coasting trade conflict with the act of the legislature authorizing this bridge? Upon the authorities I do not think it does. The supreme court seems to have been careful not to declare a conflict between state and federal legislation on this subject upon mere implication; and the reason of this is apparent. Congress can at any time declare specifically what shall be a lawful bridge and what shall not; and as it belongs more properly to the political than the judicial power to determine such questions, the courts will not assume that a bridge is an unlawful obstruction because it incidentally conflicts with or limits some right or privilege claimed or existing under an act of congress.

A license to engage in the coasting trade means something. As was said by Mr. Justice Swayne, in *Gilman v. Philadelphia*, *supra*, it "carries with it right and authority. 'Commerce among the states' does not stop at the state line. Coming from abroad it penetrates wherever it can find navigable waters reaching from without into the interior, and

may follow them up as far as navigation is practicable." And in *Gibbons v. Ogden*, *supra*, it was held that a law of the state of New York, giving certain persons the exclusive right to navigate the waters of that state by vessels propelled by steam or fire, as against such license, was void. In this last case the law of the state was in direct conflict with that of congress. The latter said, in effect, to its licensee, "You are authorized to navigate the waters of New York with vessels propelled by steam," while the former said "You shall not do so." But in this case there is no necessary conflict between the law of the state and the United States. A license to engage in the coasting trade on the Wallamet river is a license to navigate only so far as it may be navigable. But if the state, in the exercise of its police power to build bridges, obstructs, or even destroys, the navigation of the river, the weight of authority, and, I think, of prudential reason, is that the act of congress licensing the plaintiff's steam-boat to navigate it is not thereby infringed. It is thought to be safer for the courts not to assume that congress intended to interfere with and restrain the power of the state over the navigability of the rivers within its jurisdiction until it says so directly or by necessary implication. Therefore, in the cases of *Wilson v. Blackbird Creek Marsh Co.* 2 Pet. 245; *The Passaic Bridges*, 3 Wall. 782; and *Gilman v. Philadelphia*, Id. 713, it was held that the enrollment and license acts which authorized vessels to navigate the waters of particular states were not sufficient to warrant the inference that congress thereby intended to interfere with the right of the states to dam or otherwise obstruct the navigation of said waters.

Does the act of February 14, 1859, *supra*, conflict with the act of the state legislature authorizing the erection of this bridge? This act, unlike the one providing for the enrollment and license of vessels, relates directly to the navigability of the waters within the state. Its only purpose is to preserve them for the free use of all the citizens of the United States as common highways. It was passed by congress in pursuance of its control over them as a means of commerce, (*Pollard v. Hogan*, 3 How. 229,) to secure their

free navigability to the inhabitants of the Union, against the possible exactions and obstructions of local authority, prompted by considerations of local convenience or selfishness. The provision, even to its very language, is as old as the articles of compact between the original states and the people and the states of the territory north-west of the Ohio, contained in the ordinance of 1787, for the government of said territory, from the fourth of which it is copied. This ordinance was ratified or recognized by the first congress under the constitution, (1 St. 50,) and the provision securing the freedom of "the navigable waters leading into the Mississippi and St. Lawrence" has been continued in force in all the states formed out of said territory to this day. *Columbus Ins. Co. v. Curtenius*, 6 McLean, 209.

In *Penn. v. W. & B. Bridge Co.* 13 How. 518, it was held that a provision in a compact (December 18, 1789) between Virginia and Kentucky concerning the erection of the latter into a state, to the effect that the navigation of the Ohio, so far as the territory of the two states joined thereon, "shall be free and common to the citizens of the United States," which was afterwards sanctioned by congress in the passage of the act (1 St. 189) admitting Kentucky into the Union, was a restraint upon the power of Virginia to obstruct the navigation of said river by the erection of a bridge thereon within her own limits, and that a bridge so erected, which was a substantial obstruction to such navigation, was a nuisance and unlawful.

To the same effect is the decision in *Columbus Ins. Co. v. Curtenius*, *supra*, in which it was held that congress had declared, by the ordinance of 1787 and otherwise, that the navigable tributaries of the Mississippi were free and common highways to the citizens of the United States, and that therefore an act of the legislature of Illinois, authorizing the construction of a bridge across the Illinois river, near Peoria, was void if such bridge was a material obstruction to the navigation of said river, as being in conflict with the federal legislation declaring it free and common.

These decisions are the authoritative and uncontradicted

exposition of the effect of federal legislation declaring a navigable river forever free and common to the citizens of the United States, upon the otherwise unlimited power of a state to obstruct or impede the navigation thereof within its own limits. And the reasoning upon which they rest seems unanswerable. It is self-evident that a river cannot be a common highway, forever free to all the citizens of the United States, which the legislature of any one state has the power to essentially obstruct.

In a well-considered case cited by the defendant, (*The People v. S. & R. Ry. Co.* 15 Wend. 132,) in which the right to bridge the Hudson river, in pursuance of an act of the state legislature, was under consideration, Mr. Chief Justice Savage announced the same conclusion, saying: "The place where * * the bridge is built is one which coasting vessels have a right to pass, and where any obstruction entirely preventing or essentially impeding the navigation would be unlawful."

In comparing the federal and state acts to ascertain if there is any conflict between them, the circumstances of the case—that is, the character and relative importance of the river and the commerce dependent thereon, and the character and need of the bridge and the commerce dependent upon it—must be considered. For, although congress has, in effect, declared the Wallamet river to be forever a "free" and "common highway," yet these terms are used with the implied understanding that the state has the power to bridge it, if it can do so without materially impeding the navigation. What is such an impediment may be a difficult question to decide. It may depend much upon circumstances. A bridge of a certain character at a certain place may be of great benefit and convenience to a few people, or some petty local trade or business, but a serious inconvenience or injury to many people and a valuable and extensive commerce.

The commerce of Oregon, both domestic and foreign, is largely dependent upon the free navigation of the Wallamet river. Steamboats ply upon it most of the year for 100 miles or more south of Portland. At Portland the tide ebbs and

flows, and from there to its mouth, a distance of 12 miles, it is navigated by sea and inland vessels, foreign and domestic, sail and steam, that go thence up and down the great Columbia, out upon the Pacific ocean, and to all the principal ports of the world. It is the harbor of Portland, the emporium and financial center of the north-west, where the valuable products of the country are gathered from far and near and stored for market and exportation, and the imports from sister states and foreign countries are received and distributed throughout the interior. In the near future we may expect a large increase of population at this place, and throughout the country with which it maintains business relations, and the commerce of Portland will demand the free use of the harbor and water front, as far south as it can be made useful.

The present need of a bridge is to furnish a more convenient and certain means of crossing the river than a steam-ferry to the small population that live in East Portland and the neighboring villages, some portion of the passengers to and from Portland on the east-side railway, the rural population that live on the narrow strip of country between East Portland and the Columbia river, and the transportation of their limited dairy and garden products to the Portland markets. It is not intended by this statement to suggest that there is no need of a bridge across the river at this place, but only that the interests which may be promoted by it are as a drop in the bucket compared with those that may be seriously inconvenienced or injured by it. With this brief sketch of the circumstances, I proceed to consider whether the act authorizing the building of the bridge is in conflict with the act of congress declaring it a free and commercial highway. The bridge is required to be built so "as not to injuriously impede and obstruct the free navigation of the river." But the defendant claims that the provision requiring the draw to be not less than 100 feet is equivalent to declaring that a draw of 100 is sufficient. My own impression is that the act ought to be construed as authorizing a bridge which would not materially interfere with navigation, and to this end that the draw must be at least 100 feet, and as much

longer as necessary, and that the defendant is not justified thereby in building a bridge with a draw of only 100 feet, if that would materially interfere with the navigation. But if the construction claimed by the defendant is the correct one, it comes to the same thing in the end. The legislature of the state has not the power to say absolutely that a bridge may be built with only a draw of 100 feet, for if such a bridge interferes materially with the free navigation of the river, the act authorizing it is void, as being in conflict with the paramount law of congress declaring the river a free and common highway. Therefore it is that a bridge ought not to be attempted to be built across such a water as this, where so many and valuable interests are involved, without the sanction of congress, given through the engineer department. The proper location and elevation of a bridge across the river at this place, and the length and place of draw,—all the circumstances considered,—are questions that more properly pertain to the political than the judicial department of the government.

There the matter may be "equitably adjusted," so to speak, according to the circumstances of each case. Here, the court can only ascertain whether the proposed structure interferes materially with the free navigation of the river, and if it does, it must declare it unlawful.

Accordingly, within the past 15 years, congress has been induced to legislate generally and specially upon the subject of bridges across the Mississippi and its tributaries. By the act of December 17, 1872, (11 St. 398,) it is provided that no bridge can be built across the Ohio river without complying with the directions of that act, one of which is that every bridge below the suspension one at Cincinnati shall have a high span of 100 feet above low water, with a space of 400 feet between the piers, and a pivot draw, with two clear openings of 160 feet each; and by act of April 1, 1872, (17 St. 44,) a railway bridge was authorized across the Mississippi, near Clinton, Iowa, with a draw of not less than 160 feet,—the same to be located, built, and kept subject to the directions of the secretary of war for the security of naviga-

tion, subject even then to be abated as a nuisance by a suit in the United States court, if it should prove an obstruction to the navigation of the river; and by the act of June 4, 1872, (17 St. 215,) it is provided that all bridges thereafter built across the Mississippi, by authority of congress, shall be subject to the same direction and control of the secretary of war.

By an act of July 25, 1866, (14 St. 244,) congress authorized the building of seven bridges across the Mississippi at different points above St. Louis, and one across the Missouri at Kansas City, and provided that each of them should have two draw openings of not less than 160 feet in the clear. By acts of February 24, 1871, (16 St. 430,) and March 3, 1871, (Id. 473,) bridges were authorized across the Missouri river at Omaha, Nebraska, and Louisiana, Missouri, with two draw openings of not less than 200 feet in the clear.

These citations of congressional action might be multiplied greatly. See report of Gouverneur K. Warren, U. S. major of engineers, on bridging the Mississippi between St. Paul and St. Louis, 1878, pp. 193, 202. Indeed, congress has spoken on the subject of bridging the Wallamet at this place. By act of February 2, 1870, (16 St. 64,) the city of Portland was authorized to bridge the river, under the direction of the secretary of war, so as "not to obstruct, impair, or injuriously modify the navigation" of the same. This act expired by its own limitation within six years, and nothing was done under it but an examination and approval of a plan by a board of engineers and the secretary, December 30, 1872.

By this plan the bridge was located at the foot of Columbia street—1,820 feet above Morrison—and was to have a draw of 100 feet in the clear on each side of the pivot pier. And on June 23, 1874, (18 St. 281,) congress authorized the Oregon & California Railway Company to bridge the Wallamet river at Portland, under the direction of the secretary of war in all respects, except that the draw should not be less than 300 feet in width, so as "not to obstruct, impair, or injuriously affect the navigation of the same." Nothing has been done under this act, but it is still in force.

Taking these instances of congressional action as a reason—
v.6,no.4—22

able indication as to what is necessary in the construction of a bridge over this and other navigable waters of no more importance than this, and navigated with vessels of less tonnage, to prevent the navigation from being injuriously affected thereby, and weighing the testimony in the case, I think this bridge is such an obstruction to the navigation of the Wallamet as prevents its being a free and common highway to the citizens of the United States, and is therefore a nuisance, and unlawful. Indeed, I have no doubt of it. Forty-two persons, mostly navigators, including, I think, nearly all the pilots on the Columbia and Wallamet rivers, testify unqualifiedly that the draw is too narrow, and ought to be 200 feet instead of 100; and that in the winter season especially, the time when vessels usually load with grain for foreign ports, owing to the strong currents and high winds, it will be very unsafe to go through the draw with a good-sized river steam-boat, let alone a tug and sail vessel occupying a space from 70 to 80 feet.

The United States engineer in charge of the river and harbor improvements in this district, Col. George L. Gillespie, U. S. A., reports to the chief of engineers at Washington, on December 29, 1880, at length upon the subject of this bridge, and concludes that it should have been located at Columbia street; but if allowed to be constructed at Morrison, the draw should be enlarged to not less than 200 feet, and that a bridge there with a draw of only 100 feet will result in frequent loss to shipping, and may prevent sea-going vessels from going above the bridge altogether. In reply to this mass of testimony the defendant has introduced six affidavits, one of them being from the contractor, and another from the president of the company; only two of them being from river pilots. The principal point made in them is that the bridge will be more dangerous to navigation if left in its present condition than if completed. But a sufficient answer to this is that a court may require by the injunction that the defendant undo what he has done amiss, as well as to refrain from so doing. *C. S. U. Co. v. V. & G. H. W. Co.* 1 Sawy. 482. In my judgment the preliminary injunction should be allowed. The

defendant ought not to be permitted, against this showing, to place this structure in the river until its right to do so is definitely ascertained and determined. I am surprised that any person should have the hardihood to undertake such an important enterprise, in the face of the act of February 14, 1859, *supra*, declaring the river a common highway, and the congressional legislation of the last 15 years upon the subject of bridging navigable waters of the United States, without first obtaining the sanction of congress.

But this being a matter of some moment to the defendant, I have concluded to delay the issuing of the injunction until the first day of the next term, April 11th, or as soon thereafter as the circuit judge is present, when the matter may be further heard, if the defendant desires it; and in the meantime the defendant will be restrained by order, as prayed in the bill.

HAMILTON and others v. CHOUTEAU and others.

(Circuit Court, E. D. Missouri. January 17, 1881.)

1. FEDERAL JURISDICTION—INSOLVENT LIFE INSURANCE COMPANY—RECEIVER OF STATE COURT—POLICY-HOLDERS—STOCKHOLDERS—FRAUD.

Suit was instituted in a federal court by the policy-holders of an insolvent life insurance company against its stockholders for the fraudulent appropriation of a part of the assets of the company. *Held*, that such court could not assume jurisdiction when the company was in the hands of a receiver of a state court, who was proceeding to collect and administer the assets for the benefit of all the creditors.—[Ed.]

In Equity. Demurrer.

This was a bill filed by the policy-holders of the St. Louis Mutual Life Insurance Company for relief against its stockholders. The company, a Missouri corporation, was chartered on the mutual plan, with stock of the par value of \$100,000, of which defendants were the owners. Proceedings were commenced in the state court by the insurance commissioner

to wind up the company, after which, on the thirteenth day of December, 1873, its directors, by the sanction of the commissioner and decree of the court, conveyed and delivered the assets of said company to the Mound City Life Insurance Company, a Missouri corporation, in consideration of a covenant on its part that it would re-insure all outstanding risks and pay all liabilities of said St. Louis Mutual Life Insurance Company; and likewise redeem and take up said stock by delivering a like amount of its own stock to the owners, with a right on their part, at any time within one year from the date of said contract of re-insurance, to return said new stock to the Mound City, and receive from it the par value; all of which is alleged to have been done by the defendants, and that defendants received from the Mound City the par value of their stock, which was paid to them out of the assets received of the St. Louis Mutual Life Insurance Company under this contract of re-insurance. The Mound City Life Insurance Company became insolvent, and was unable to keep its agreements of re-insurance, in consequence of which both companies have been declared insolvent by proceedings in the state court, and are now in the hands of their respective receivers, and being wound up under the Missouri law. It is further alleged that the contract of re-insurance was fraudulent and void, and that the money of the St. Louis Mutual Life Insurance Company in the hands of the Mound City was charged with a trust in favor of the plaintiffs, and that the defendants fraudulently agreed to this arrangement so as to be able to realize par for their stock, which was worthless, and should in equity account to plaintiffs for the amount received from the Mound City.

Robt. Crawford, for plaintiffs.

Chire, Jamison & Day, for defendants.

TREAT, D. J. The demurrer in this case is both general and special. By the terms of the bill it appears that the various insurance companies named are in the hands of receivers duly appointed by a state court of competent jurisdiction, and that their affairs are in the course of judicial administration. If the allegations of the bill are true, as

confessed by demurrer, said receivers are the proper parties to receive whatever may be due by defendants, so that the same may be distributed *pro rata* among the creditors. Undoubtedly, if such a fraudulent scheme existed, as is charged, whereby the parties defendant, for their own private gain, caused the plaintiff and other policy holders to be defrauded of their lawful demands, said defendants should, in a proper proceeding, be compelled to refund for the common benefit. It must be observed, however, that the bill, even in that view, is fatally defective, except on one hypothesis, imperfectly presented. The defendants, it is charged, were respectively stockholders in the St. Louis Mutual Life Insurance Company. Each held a different number of shares. It nowhere appears that said stock was not fully paid up, and consequently that the stockholders were liable for the debts of the company. It is alleged, however, that all the assets of said company were, with their connivance, etc., transferred to the Mound Mutual Company, of whose shares of stock they were to receive a like number to those held in the St. Louis Mutual, subject to be paid off at par by the Mound Mutual; that those shares were so paid off, and the defendants became the respective beneficiaries thereof; and that the only and main source of payment was from the St. Louis Mutual. Practically, the insolvent St. Louis Mutual, through the fraud charged, secured to these conniving stockholders full pay at par for their worthless stock out of the assets which should have been devoted to the payment of its debts.

It is not doubted that under sufficient averments in a proper state of such a case equity would lay its hands upon funds thus fraudulently acquired, and apply them for the benefit of honest creditors. But it is averred that the St. Louis Mutual is now, and has been for years, in the hands of a competent receiver, who is proceeding to collect and administer its assets for the benefit of all creditors. Why, then, should this court (the receiver being no party) undertake to collect and administer a fragment of the assets? Will a chancery court split assets and demands to the extent of upholding as many suits as there may be creditors or items

of assets? Instead of avoiding thereby it would indefinitely create a multiplicity of suits. If this court took charge of this suit it would be compelled to bring in all the parties and take custody of the assets in order that each creditor might receive his *pro rata*; for equality is equity.

The grave question as to jurisdiction remains with reference to the citizenship of the parties. This subject has been considered in several cases this term, and all that need be added now is that the bill is fatally defective.

The demurrer is sustained.

GRISWOLD v. BRAGG and Wife.

(Circuit Court, D. Connecticut. February 21, 1881.)

1. BETTERMENT ACT—CONN. GEN. ST. (REV. 1875) p. 362, CONSTRUED.

Where a defendant in ejectment, in good faith, believing that he had an absolute title to the land in question, has made valuable improvements thereon, before the commencement of the action of ejectment, final judgment will not be rendered for the plaintiff in ejectment until he has paid to the defendant the value of his improvements, less the sum due by him for use and occupation.

Where good faith and belief actually existed, the deeds not showing that an absolute title was not conveyed, and the defendant not being chargeable with laches, he will be allowed the value of his improvements, notwithstanding that he held merely under a quitclaim deed.

Mere notice of adverse claim does not forbid the conclusion that such subsequent improvements were made in good faith.

In Equity.

SHIPMAN, D. J. This is a bill in equity, supplemental to an action of ejectment in favor of the present defendants against the present plaintiff, and founded upon the statute of this state commonly called the "Betterment Act." Gen. St. (Rev. 1875,) p. 362.* The plaintiff in the ejectment suit recovered

*"Final judgment shall not be rendered against any defendant in an action of ejectment, who or whose grantors or ancestors have in good faith, believing that he or they, as the case may be, had an absolute title to the land in question, made improvements thereon before the commencement of the action, until the court shall ascertain the present value

a verdict against the defendant for the seizin and possession of an undivided fourth part of a tract of land containing an auger factory and a mill privilege in the town of Chester. The defendant thereupon filed a bill praying for the relief provided for by the statute.

On May 5, 1845, Joseph C. Dudley conveyed the land in question, and other lands, by warranty deed, to Joshua L'Hommedieu, and on March 28, 1846, the said Dudley, as guardian, appointed by a court of probate in the state of Massachusetts, of his minor children, Orestes Dudley and Cecelia M. Dudley, conveyed to said Joshua and Ezra L'Hommedieu the interest of said minors in all said lands by virtue of an order purporting to have been made by the court of probate for the district of Saybrook, wherein said lands were situate. Ezra L'Hommedieu conveyed to said Joshua his (the said Ezra's) interest in the land now in controversy, by quitclaim deed dated February 22, 1850.

Joseph C. Dudley and his children derived title to these lands from Harmon Dudley by his last will. The devise was in the following words: "All my real estate not otherwise disposed of in this my last will and testament, of every kind and description, I give and devise to my nephew, Joseph Cyprian Dudley, the son of my brother Joseph Dudley, to have and to hold the same as an estate in tail to him, the said Joseph Cyprian Dudley, and to the heirs of his body begotten; it being my expectation and understanding that in the heirs of the said Joseph Cyprian the same will become and be an estate in fee-simple."

By this will an estate in fee tail was vested in Joseph C. Dudley and a fee-simple absolute in his issue. The tenant thereof, and the amount reasonably due to the plaintiff from the defendant for the use and occupation of the premises; and if such value of such improvements exceeds such amount due for use and occupation, final judgment shall not be rendered until the plaintiff has paid said balance to the defendant. But if the plaintiff shall elect to have the title confirmed in the defendant, and shall, upon the rendition of the verdict, file notice of such election with the clerk of the court, the court shall ascertain what sum ought in equity to be paid to the plaintiff by the defendant, or other parties in interest, and on payment thereof may confirm the title to said land in the parties paying it."

in tail died on January 15, 1877. A daughter, Ida E. Bragg, one of the plaintiffs in the ejectment suit, was born August 6, 1855. The interest of said Ida in said lands was not conveyed by either deed, and at the death of her father she owned an undivided fourth of the land now in question.

Joshua L'Hommedieu conveyed said land to the plaintiff and others, his partners in business, by warranty deed, dated December 6, 1850, subject to a mortgage of \$450 to the state of Connecticut. This mortgage was quitclaimed on January 8, 1852; the land was remortgaged to the state to secure the payment of the same sum on January 2, 1852; and this last mortgage was quitclaimed on August 10, 1853.

On or about August 25, 1863, the plaintiff and his partners conveyed said land to Turner & Day, the plaintiff conveying by deed of warranty. On February 15, 1865, the said Turner & Day and Edward C. Hungerford, who had theretofore become a partner with the other grantors, conveyed by quitclaim deed the whole of the land in question to the plaintiff, who has ever since been in possession thereof, in the actual and *bona fide* belief that it was his actual estate in fee-simple.

In January, 1877, Henry W. Ely, Esq., of Westfield, Massachusetts, as attorney for Mrs. Bragg, notified the plaintiff of her claim of title to said property. At or about the same time, similar notifications were given to the other occupants of the land originally conveyed to Joshua L'Hommedieu, and which had now become subdivided, and was owned by 16 or 18 reputed owners. Much of the land was now improved. Dwellings, two factories, and a church were upon the property. These owners held a meeting, and appointed a committee or agent to examine the question of title. He employed counsel, who reported that the claim was entirely without foundation. The plaintiff consulted the same lawyer and received the same opinion. The committee visited Westfield, saw Mr. Ely and the relatives of Mrs. Bragg, and obtained the idea, from these and other conversations, that the claim would not be pursued, and that it was an attempt to extort money without right, and so reported to the plaintiff.

The plaintiff's factory was burned on October 15, 1878. He commenced rebuilding on November 1, 1878. The new building was completed about January 1, 1879. Before rebuilding he asked the same counsel whether there could be any doubt as to the validity of his title, and received answer that Mrs. Bragg had no valid claim.

On January 26, 1878, Mr. Ely offered to give a discharge from all the Dudley children to all the owners for \$1,400. This offer was declined, and on February 21, 1878, Mr. Ely made a like offer of discharge for \$500. On March 2, 1878, Mr. Bragg repeated this proposition, accompanied with the assurance that if it was not accepted suit would be commenced immediately. Suit was commenced on April 10, 1879.

Between December 6, 1850, and February 15, 1865, the owners of this property made repairs and some slight improvements thereon, but the improvements are so small that no account is made of them (except the portion of the permanent improvements upon the dam which may have been made by Turner, Day & Co.) until after the repurchase by the plaintiff in 1865. Since then the dam has been substantially rebuilt, additional buildings and a store erected, walls and a fence built, trees set out, and the brook straightened. After the fire a new building and foundation were built.

The testimony leaves no room for doubt that up to the date of the suit the plaintiff continuously believed that he was the absolute owner of said property from and after February 15, 1865, and that he had a perfect title thereto in fee simple, and that the claim of the defendants was without foundation. Neither is there any doubt that the plaintiff and his grantors made all their improvements upon said property, before the commencement of the action at law, in the like belief of absolute title, and in perfect good faith, in fact, both with themselves and towards any known or unknown claimants. These improvements are valuable, and have a present value in the enhancement of the price of said property.

The averments of the bill are found to be true, except as to the value of the betterments, and except as to the averment that a joiner's shop constituted one of the improvements.

This shop was erected upon the land by license of the plaintiff, with the right to purchase the same. That privilege has not yet been exercised.

In addition to the questions of fact in the case, the defendants contend:

First. That the plaintiff, holding merely under a quitclaim deed, cannot be a *bona fide* purchaser without notice.

It is true that in a class of cases in equity no person deriving title merely by a quitclaim deed is considered a *bona fide* purchaser, (*Oliver v. Piatt*, 3 How. 333; *May v. Le Clair*, 11 Wall. 217; *Dickerson v. Colgrove*, 100 U. S. 578;) but I do not think that this principle or these decisions are applicable to this statute. The questions under this statute of good faith and of belief are those of fact. Were the improvements made in good faith and in the belief of an absolute title? If they were in fact so made, the plaintiff is entitled to the remedy. By the words "good faith" I do not think that the legislature had in view an arbitrary rule that a particular kind of conveyance necessarily bars the existence of good faith in the purchaser. The statute was intended to be remedial, and to provide that if good faith and belief actually existed, the deeds not showing upon their face that an absolute title was not conveyed, and the purchaser not being chargeable with laches, then the equitable powers of the courts might be exercised.

Second. It is claimed that, inasmuch as the plaintiff rebuilt his burned mill after notice of the claim of Mrs. Bragg, he cannot be considered as having acted in good faith so far as subsequent improvements are concerned.

Prior to the Revision of 1875 the belief of good title was alone required. The statute now provides that the ejectment defendant shall also have made improvements in good faith. Mere belief of title is not sufficient. A wealthy occupant is not to make, without good reason, extensive improvements upon land which is to his knowledge earnestly claimed by another. The reputed owner must act in good faith; that is to say, fairly, considerately, in good conscience, with integrity of purpose, and without rash haste. But it may not be

inconsistent with his good faith that some person had at some time asserted a claim upon his property. The notice of claim may be a circumstance all-important, and it may be of trifling consequence.

In this case notice was given in January, 1877, of attack upon all the titles of land in a part of a village. The alleged defect was treated as of no consequence by competent lawyers who were consulted or who professed to give an opinion. The claim was virtually declared to be valueless by near relatives of the claimant. In January, 1878, her attorney offered to give a complete title to all the owners for \$1,400, and in the succeeding month he made a like offer for \$500. In March, 1878, this offer was repeated, with threat of immediate suit in case of non-acceptance, but no suit had been commenced when the plaintiff rebuilt in the fall and winter of 1878-9. Under these circumstances the plaintiff acted not only in good faith towards the claimant, but he had some reason to believe that she was acting in bad faith towards him.

The mere notice of adverse claim is not considered in other states which have statutes of similar general character to forbid the conclusion that subsequent improvements were made in good faith. *Harrison v. Castner*, 11 Ohio St. 347; *Wells v. Riley*, 2 Dillon, 569.

By agreement of the parties, the wheel and shaft connected therewith, and main line of shafting, and all machinery, fixed and movable, are excluded from the computation of the value of improvements, and the said machinery, fixed and movable, shafting, shaft, and wheel, are agreed to belong to said Griswold, and not to pass to said Bragg and wife by virtue of any judgment in the ejectment suit.

The present value of the improvements upon said land thus made by the plaintiff, excluding the value of the machinery by virtue of the foregoing stipulation, I find to be \$6,100; one-fourth of which is \$1,525. The amount due to the defendants by the plaintiff for the use and occupation of one undivided fourth of the premises for two years, one and one-half months, was found by the jury to be \$112, or at the rate of \$4.40 per month.

Let there be a decree for the plaintiff that final judgment shall not be rendered until the plaintiff in ejectment has paid the balance thus found to be due to the ejectment defendant.

WESTPHAL and others v. LUDLOW.

(Circuit Court, D. Minnesota. March, 1881.)

1. PROMISSORY NOTE—COLLATERAL SECURITY—NOTICE OF DISHONOR.

The strict rules of law relative to the presentation and notice of the dishonor of promissory notes do not prevail when such notes are held as collateral security for a precedent debt.

2. SAME—ORIGINAL DEBT.

The failure to present and protest a note taken as collateral security will not defeat a recovery of the original debt, where the amount of the note was not lost through the negligence of the creditor.—[Ed.]

This action was tried before the court without a jury.

The plaintiffs are citizens and residents of the state of Iowa, and the defendant is a citizen and resident of the state of Minnesota.

In the year 1878, and previous to the month of September, the defendant was indebted to the plaintiffs for goods sold, and on the eighteenth of that month he enclosed in a letter to them a note of C. St. John Cole for \$325, dated November 14, 1877, payable to defendant's order 12 months from date, and indorsed by him, proposing that they accept the note as payment on his account, the interest being computed to that date. Plaintiffs answered, declining the proposition, on September 11, 1878, but saying they would take it for collection, "applying the proceeds on your [his] account if collected at maturity." Not receiving a reply, plaintiffs, on September 21st, wrote, inquiring whether they should return the note or "send it for collection, applying proceeds on your [defendant's] account."

The defendant replied September 27th, according to the plaintiffs' suggestion, requesting them to collect it, and stat-

ing that "the maker would pay it at the Worthington bank; then you [plaintiffs] can credit me with all you get."

The plaintiffs sent the note to the Worthington bank, and on November 22d, after its maturity, wrote the bank: "Mr. C. St. John Cole's note is now past due. What does he say about it? and what are the prospects of its being paid?" The bank answered, November 25th: "C. St. John Cole's note (No. 1386) is still unpaid. We think he can pay something on it in 10 days. Shall we keep it or return it?" November 27th the plaintiffs instructed the bank to keep it 10 days. On December 6th the bank returned the note, informing the plaintiffs that Cole was closed up by levy on goods that day. On December 9th plaintiffs returned the note to the defendant, and he, through an attorney, sent the note back, stating "that the same had been lost and become worthless through your [plaintiffs'] negligence."

Defendant was informed, November 27 or 29, 1878, that the note was unpaid and in bank, and did not write the plaintiffs or take immediate steps to obtain possession of it; but, on the contrary, wrote them, November 29th, that "Cole is behind some, but is taking everything in rotation, and says he will get to that note, he thinks, the last of next week."

Cole confessed judgments and the sheriff took possession of his stock, valued at \$2,200, December 6th, which embraced all of his visible property. This amount was not enough to pay all of his indebtedness. The evidence is that on November 17th, when this note matured, Cole was in no better financial condition.

Rogers & Rogers, for plaintiffs.

Chas. D. Kerr, for defendant.

NELSON, D. J. The plaintiffs are not held to the strict rules in regard to the presentment, at maturity, of the note taken as collateral security, and notice of non-payment to his debtor. The note was not received, although indorsed by the defendant, upon the condition that they would use such diligence. It does not represent the original debt, and to hold the defendant it is not necessary that the plaintiffs should regularly proceed to have the note presented and protested. It was

not a satisfaction and extinguishment of the original debt, and a failure to give notice of non-payment will not necessarily defeat a recovery. If, however, by the neglect and laches of the plaintiffs the defendant was injured and the amount of the note lost, he may plead such negligence as a defence, for in such case the plaintiffs would be bound, as trustees or agents, to see that the defendant did not suffer loss on their account.

Was the note lost through the plaintiffs' negligence? Defendant urges that the insolvency of the maker occurred after its maturity, and if he had been informed of its non-payment he could have secured himself. The evidence, as interpreted by me, does not prove the insolvency of the maker occurred after the note matured.

The maker, in his testimony, says his financial condition at the maturity of the note was the same as December 5th, when several judgments were confessed by him in favor of other creditors, and there is no evidence to the contrary. He certainly had not sufficient property to pay his debts, and thus, I think, was insolvent at the maturity of the note. Judge Washington, in *Gallagher's Ex'rs v. Roberts*, 2 Wash. 191, says Buller lays down the true rule in his *Nisi Prius*, (Ed. 1806) p. 182: "If a note is indorsed for a precedent debt, and a receipt was given as for so much money when the note shall be paid, and the creditor neglects to apply to the maker in time, and by his laches the note is lost, the precedent debt is extinguished;" but if it is kept without demand and insolvency takes place, the creditor who receives it must lose. See, also, 2 How. (U. S.) 457. This doctrine determines this case. The note taken as collateral security matured November 17, 1878. The defendant knew it was unpaid November 29, when he quieted the plaintiffs by writing them that Cole would pay it soon.

There is no direct evidence of a demand made for payment at maturity, and if it is conceded that he was not applied to in time, there is not in addition laches which damaged the defendant. Cole was insolvent, in fact, when the note matured, and the ordinary mode of legal proceedings would not

save the debt. There is no evidence to show that a writ of attachment could have been obtained, and even the defendant, who lived near Cole, says that he was not aware of his insolvency at that time, and doubted it as late as December, when the levies were made.

Judgment will be entered for the plaintiffs for the amount claimed.

BARLOW v. ARNOLD, Executrix, etc.*

(Circuit Court, D. Kentucky. March, 1881.)

1. STATUTE OF LIMITATIONS—KENTUCKY—FRAUD—DISCOVERY OF—WHEN CAUSE OF ACTION ACCRUES—PLEADING—PRACTICE.

The Kentucky statute of limitations (Gen. St. art. 3, c. 71, § 6) provides that "in actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake;" and, by section 2, such actions must "be commenced within five years next after the cause of action accrued." In a suit to recover money expended and lost by reason of the fraudulent representations of defendant's testator, *held*, that it will be presumed that the cause of action arose when the fraud was committed, and, to avoid such presumption, the plaintiff must allege and prove the time of the discovery of the fraud.

2. SAME—PLEADING—PRACTICE.

And where the defendant had pleaded the statute, alleging that the cause of action accrued when the alleged fraud was committed, (which was more than five years before the suit was brought,) *held*, that upon failure to reply thereto the defendant is not deprived of her right to a judgment in her favor, because she had also alleged that the fraud was discovered more than five years before suit was brought, to which the plaintiff had tendered the general issue.

3. KENTUCKY CODE—PRACTICE—STATUTE OF LIMITATIONS—DEMURRER—EQUITY PRACTICE.

Motion for Judgment on the Pleadings.

R. W. Wooley and Muir & Heyman, for plaintiff.

Bijur & Davie and W. H. Cheef, for defendant.

*Reported by Messrs. Florien Giauque and J. C. Harper, of the Cincinnati bar.

BARR, D. J. This suit is brought to recover of defendant, as executrix, the sum of \$100,000, with interest from July 29, 1872, which it is alleged was expended and lost by reason of, and upon, the fraudulent pretences and representations made by Philip Arnold to the plaintiff in reference to a pretended discovery of a diamond field on the borders of New Mexico and Arizona. The answer of the defendant traverses the allegations of the petition, and pleads and relies upon the statute of limitations, which bars such actions after five years. One of the paragraphs of the answer alleges that the cause of action accrued when the money was paid, in July, 1872, and when the alleged fraud was perpetrated; and the other paragraph sets up and relies upon the statute of limitations, upon the idea that the cause of action accrued when plaintiff discovered the fraud, or could with reasonable diligence have discovered it. This is alleged to have been in the month of November or December, 1872. The replication of plaintiff, in one of its paragraphs, attempts to avoid the allegation of the second paragraph in the answer by alleging the discovery of the fraud of Arnold within five years before the bringing of the suit, which was October 23, 1879. This paragraph of the replication has been held bad on demurrer, because it did not allege any facts showing or tending to show diligence in the investigation of the alleged fraud. Time was given plaintiff to amend his replication. This time has expired, and no amendment has been filed or tendered. The demurrer to the other paragraph of the replication was overruled. This paragraph (third) was perhaps intended to be a traverse of the third paragraph of the answer of the defendant, which sets up and relies upon the statute of limitations, upon the idea that the cause of action only accrued when the fraud was discovered, and that the burden of alleging and proving when the discovery was made, is upon the defendant.

The defendant now moves the court for judgment upon the plea of the statute, as pleaded in the second paragraph of the answer. This motion is based upon the theory that plaintiff's cause of action is presumed to have accrued when the fraud is alleged to have been perpetrated, and the money

paid in consequence of said fraud ; and that, to avoid the running of the statute from that time, the plaintiff must allege facts tending to show that, after using reasonable diligence, he did not discover the fraud until within five years before the institution of this suit.

If this be true, then defendant is entitled to a judgment on the plea of the statute of limitations, because that plea is not traversed or avoided.

The sixth section of article 3, c. 71, Gen. St., title, "Limitations of Actions," is in these words: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought 10 years after the time of making the contract or the perpetration of the fraud."

In a previous section (second) of same article and chapter, it is enacted that "an action for relief on the ground of fraud or mistake" "shall be commenced within five years next after the cause of action accrued."

The question is, when does the cause of action accrue in such cases?

It is necessary for the defendant, under the Kentucky Code system, to plead the statute of limitations, but whether it is sufficient for him to assume that the cause of action accrued upon the perpetration of the fraud, and leave to the plaintiff to avoid the running of the statute from the perpetration of the fraud by the allegation and proof of a discovery of the fraud since its perpetration, is an undecided question in this state.

It may be argued that, under section 6, if the defendant relies on the 10-year limitation as therein provided, he must allege that the fraud complained of was *perpetrated* more than 10 years before the bringing of the suit; and that if he relies on the five-year limitation of that section, he should allege the *discovery* of the alleged fraud more than five years before the institution of this suit. This argument would not be without force, but the objection to it is that there would be different times when the cause of action accrues on the same

state of facts, depending upon whether or not the limitation pleaded was five or ten years. Again, it would throw upon the defendant the burden of alleging and proving the time of the plaintiff's discovery of the fraud.

The time of the plaintiff's discovery of the fraud is always within his knowledge, and rarely within that of the defendant. If, therefore, a defendant is required to allege and prove the time of the plaintiff's discovery of the fraud, he might be often deprived of the benefit of the statute of limitations, which is a statute of repose, and should be liberally construed.

The earlier equity practice would have required the setting up in the bill of the alleged fraud, to which the defendant might have pleaded the lapse of time, and to that plaintiff might reply the recent discovery of the fraud. Story, Eq. Pl. §§ 676, 677. The later equity practice required the plaintiff in his bill to allege the time of the discovery of the fraud, so as to avoid the lapse of time and the plea of the statute where it applied. See Mitford & Tyler, Pl. 356; *Carr, Assignee, v. Hilton*, 1 Curtis, 390; Story, Eq. Pl. § 754; *Field v. Wilson*, 6 B. Mon. 489; *Carmals v. Parker, Adm'r*, 7 J. Marsh. 455.

In equity, the burden of alleging and proving, if denied, the time of the discovery of a fraud, is upon the plaintiff, in the suit for relief upon that ground.

I have heretofore construed this section of the statute of limitations by the light of the previous equity rule, in the suits for relief for fraud or mistake, and it is proper that the equity practice, as to the mode of pleading, should be applied as far as it can be, having regard to the express provisions of the Code of Practice.

The Kentucky Code, unlike that of New York and many other states, requires parties to plead to an issue, and recognizes such pleadings as replies, rejoinders, surrejoinders, etc. Section 100. It is, therefore, difficult to find any decision touching upon the point under consideration.

The New York Code provides that in cases of fraud, the cause of action is "not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the

fraud." New York Code, § 91, subsec. 6. The question under this section arose as to the burden of proving the time of discovery of the fraud. The superior court, in *Baldwin v. Martin*, 35 N. Y. Sup. Ct. 98, held that the burden of proving the time of the discovery, was upon the plaintiff.

The previous New York statute was that "bills for relief on the ground of fraud shall be filed within six years after the discovery of the facts constituting such fraud, and not after that time." 2 Rev. St. 399. The supreme court, in *Enecks-son v. Queen*, 3 Lans. 302, in construing this law, held that the burden was on plaintiff to allege and prove the time of discovery.

It is true, the New York statute provided that the suit should not be brought "after that time," and the New York Code did not require a reply to the answer setting up the plea of the statute of limitations; still, the principle upon which those cases were decided sustains the view contended for by defendant's counsel.

The inclination of my mind, when this question was first presented, was that the defendant should allege and prove the time of the discovery of the fraud by plaintiff, Barlow; but subsequent reflection and examination of the authorities has satisfied me that the burden of alleging and proving the time of the discovery of this fraud is upon plaintiff, and therefore the second paragraph of defendant's answer is a good plea of the statute of limitations; and, as it is neither traversed nor avoided by the plaintiff, the defendant is entitled to a judgment on her plea.

The fact that the defendant has assumed the burden and alleged the time of the discovery in the third paragraph of her answer, does not deprive her of her right to a judgment on her second paragraph. It is unnecessary to consider the other motions, as defendant is entitled to a judgment on her motion, as herein indicated.

DALLES CITY v. THE MISSIONARY SOCIETY OF THE M. E.
CHURCH.

KELLY and others v. THE SAME.

KELLY and another v. THE SAME.

(District Court, D. Oregon. December 3, 1879.)

1. GRANT TO MISSIONS IN OREGON.

The grant to religious societies of mission stations in Oregon, contained in section 1 of the act of August 14, 1848, (9 St. 323,) is not confined to a single station to each society, but includes as many stations as were then actually occupied by each society for missionary purposes among the Indians.

2. PATENT—SURVEY.

A patent issued under section 2447 of the Rev. St., upon a survey not approved by the surveyor general, is void; and in case of a grant under section 1 of the act of August 14, 1848, the survey to be approved by the surveyor general necessarily involves the determination of the question, what is the quantity and boundary of the claim?

3. MISSION STATION.

The grant to religious societies contained in the act aforesaid of the missionary stations *occupied* by them in Oregon on August 14, 1848, not exceeding 640 acres, is not confined to the land actually enclosed and cultivated by them, but should be construed to include the maximum quantity at each station occupied by them; that is, *claimed* and *in any way used* by them, and not in the actual occupation of any one else.

4. OCCUPATION OF MISSION STATION.

"Occupancy" is a word of narrower signification than possession, and means to possess by laying hold of or being actually upon the thing possessed continuously and exclusively. Prior to August 14, 1848, the title to all lands in Oregon was in the United States, and therefore no person could have constructive possession of any portion thereof, or any possession thereof, or interest therein, except actual possession or occupancy; and when this was given up or abandoned, the relation of the party to the land was absolutely terminated.

5. MISSION STATION AT THE DALLES.

The Missionary Society of the M. E. Church established a mission among the Indians at Wascopum, near the Grand Dalles of the Columbia, in 1838, and in September, 1847, abandoned and transferred the same to Dr. Whitman, of the Presbyterian mission at Wailatpu, and never re-occupied the same. *Held*, that the society did not receive a grant of said station under section 1 of the act of August 14,

1848, because it was not at that date in the actual possession and occupation of the premises; that such occupation was a condition precedent to the taking effect of such grant, and therefore it mattered not whether the failure of the society to occupy the station in August, 1848, was voluntary, or was caused by the fear of hostile Indians.

6. PAYMENT BY CONGRESS.

The payment by congress to the missionary society of \$20,000, in June, 1860, on account of the reservation of 353 acres of the Dalles mission station in March, 1850, for military purposes, and the loss or destruction of property thereon since 1847, by Oregon volunteers, Indians, or United States troops, did not have the effect to invest the society with the title to such station then or on August 14, 1848; nor was it even an admission that the society had any legal right to the premises, but only that it asserted some kind of a claim thereto which it was deemed expedient to extinguish; nor could congress, in June, 1860, by a direct recognition of a supposed prior grant to the society, affect the rights of others already acquired in the premises under the town-site and donation acts.

James K. Kelly and N. H. Gates, for plaintiffs.

Rufus Mallory and John C. Cartwright, for defendant.

DEADY, D. J. These three suits were commenced on September 18, 1877, in the circuit court for the state, in the county of Wasco. The summons was served by publication, and on September — the defendant appeared and had the cause removed to this court, where they were entered on January 30, 1878. On April 9th there was a demurrer filed to each complaint, which was disallowed, and thereupon, by the direction of the court, on May 2d, the plaintiffs in each suit restated their case in the manner of a formal bill in equity. On August 12th the defendant answered the bills, and on September 20th the plaintiffs filed the general replication. In the course of the proceedings exceptions for impertinence were taken to both the bills and the answers, which were disallowed, and the questions raised thereby reserved for consideration upon the final hearing. On October 15, 1879, the causes were heard together upon the several bills, answers, replications, and the exhibits and depositions in each, and in No. 390 so far as they were applicable to the other two.

Before touching the grounds of the controversy between the parties it may be well to state their respective cases, so

far as they rest upon either the admitted facts or those established beyond controversy.

The defendant is a corporation formed under the laws of New York, and from 1838 to September, 1847, maintained a mission among the Wascopum Indians, on the south bank of the Columbia river, at the lower end of the Grand Dalles thereof, at a place since called "The Dalles," in what is now Wasco county; and on July 9, 1875, received a patent from the United States under section 2447 of the Revised Statutes for a tract of land containing 643.37 acres, including the ground occupied by the improvements made at such mission—less 350 acres thereof included in the military reservation—the same being parts of sections 3 and 4, in township 1, N. of range 13 W., and section 33, in township 2, N. of range 13 W. of the Wallamet meridian, as a mission station occupied by it on August 14, 1848, within the purview of the second proviso to section 1 of the act of that date, "to establish the territorial government of Oregon," (9 St. 323,) which provides "that the title to the land, not exceeding 640 acres, *now occupied as missionary stations* among the Indian tribes of said territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong."

The plaintiffs claim that the defendant did not occupy this tract, or any portion of it, as a missionary station or otherwise, on August 14, 1848, or since September, 1847, and that therefore it was not within the purview of said proviso, and the patent to the defendant was wrongfully issued; and also that they are the owners of, and entitled to, the patent for certain portions of said tract, as hereinafter stated, and ask to have their several rights therein established and declared, and that the defendant be so far regarded as their trustee and required to convey to them accordingly.

In 1852 the place called "The Dalles" was occupied as a town site for the purpose of business and trade, and has been so occupied ever since, and in 1855 the county of Wasco caused the same to be surveyed into lots, blocks, and streets, and said survey to be recorded; that on January 26, 1857,

the plaintiff in No. 390—Dalles City—was made a municipal corporation, with boundaries including said town site; and on April 18, 1860, entered, at the proper land-office, the fractional north-west one-fourth of said section 3, containing 112 acres, and including the land so occupied as a town site, under the town-site law of May 23, 1844, (5 St. 667; 10 St. 306,) in trust for the several use and benefit of the occupants thereof, according to their respective interests, and now claims to be the owner thereof accordingly.

On November 1, 1853, Winsor D. Bigelow became a settler under the donation act upon 320 acres of the public land, including parts of the N. W. one-fourth and the S. W. one-half of said section 3, and now known upon the plats of the public surveys as donation claim No. 40, and resided upon and cultivated the same until February 16, 1860, and otherwise complied with the requirements of said act; that on December 9, 1862, said Bigelow conveyed an undivided one-third interest of a certain 27 acres of said donation to James K. Kelly and Aaron E. Wait, plaintiffs in No. 391; and on December 12, 1864, conveyed the remaining two-thirds of said 27 acres to Orlando Humason, who, on September 8, 1875, died testate, having devised the same to Phoebe Humason, his widow, and a plaintiff in No. 391, which 27 acres said plaintiffs, by reason of the premises, claim to own as tenants in common thereof.

On December 2, 1864, said Bigelow conveyed to said Kelly and Wait, the plaintiffs in No. 392, 46 town lots, within the limits of his said donation, and situated in what is known as the "Bluff Addition to Dalles City," which lots the plaintiffs in No. 392, by reason of the premises, claim to own as tenants in common thereof.

It is *claimed* by the defendant that in August, 1847, it agreed to turn over the missionary station at The Dalles, with the improvements thereon, to Dr. Marcus Whitman, the agent of the American Board of Commissioners for Foreign Missions, and then engaged as a lay missionary of said board at a place called Wailatpu, about 140 miles E. N. E. of The Dalles, upon the understanding that said board would main-

tain a mission there among the Indians, and that said Whitman would pay \$600 for certain personal property belonging to the mission; that, in pursuance of said agreement, said Whitman gave the defendant a draft upon said board for said \$600, and the defendant's agents and missionaries, between September 1 and 10, 1847, surrendered the station to said Whitman; that, owing to the death of said Whitman on November 29, 1847, said agreement was cancelled in 1849, by the surrender of said draft to the agent of said board and the "retransfer" of said station to the defendant, who thereupon resumed control of the same; that in June, 1850, the agent of the defendant went upon the ground and surveyed and marked the boundaries of the claim as he understood them to be; and that in 1854 the Rev. Thomas H. Pearne, its agent, notified the surveyor general of the territory of the claim of the defendant thereto; but said defendant substantially admits that from the delivery of said station to Whitman, as aforesaid, it never actually occupied the same for mission purposes or otherwise, and claims that it was prevented from so doing by the danger from Indian hostilities, growing out of what is known as the Cayuse war.

The commissioner of the general land-office authorized the surveyor general to hear and determine the conflicting claims of the defendant, Bigelow, and Dalles City to the premises, and on February 16, 1860, the parties appeared before him, and on February 2, 1861, said officer decided that the defendant had no right to the land in controversy; which decision, on an appeal to the commissioner, was, on February 7, 1863, affirmed. From there the case was carried by appeal before the secretary of the interior, who, on March 15, 1875, reversed said decision, and decided that the defendant was entitled to the premises as a mission station, and directed a patent to issue to it accordingly.

Section 2447 of the Revised Statutes, under which this patent issued to the defendant, is taken from the act of December 22, 1854, authorizing the issue of patents in certain cases, and only applies where there has been a grant by statute without a provision for the issue of a patent. In such

a case the section provides that a patent may issue for the grant "upon a survey thereof, approved by the surveyor general," and "found correct by the commissioner;" subject, however, to the qualification that "such patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

The patent in question expressly declares that it is issued to the defendant subject to this qualification. There is, then, no question in this case of the power of this court to investigate the grounds upon which this patent was issued, and to determine that they were insufficient or otherwise, either in law or fact, and decree accordingly. The patent and the subsequent action of the parties has had the effect to remit the case to this forum to try and determine to whom the patent should have issued for the portions of the tract claimed by the plaintiffs.

It is admitted that the plaintiffs are entitled to the patent for the portions claimed by them, unless the defendant was entitled to the tract as a mission station under section 1 of the act of August 14, 1848.

On April 30, 1853, the defendant, by its agent, Rev. Thomas H. Pearne, notified the land department of its claim to a mission station near Salem, in Marion county, the same being parts of sections 23 and 26, in town 7, of range 3 W., S. of the Wallamet meridian, and containing 97.39 acres, which claim was allowed.

And now the plaintiffs contend that under the act a religious society can only receive a grant of one mission station, and the defendant, having elected to take the station at Salem, is therefore barred from claiming the one at The Dalles. I do not think this is the most reasonable construction of the statute. It grants the land "occupied as missionary stations" to the several religious societies to which said stations respectively belong. It is true that this language would be satisfied with the grant of one station to each society.

But it is broad enough, in my judgment, to cover more, if more there were, and ought to have effect accordingly, unless there is some controlling reason to the contrary in the circumstances of the case. If it had been the intention of congress to limit the grant to one station to each society, such intention would have been more naturally expressed by saying, "the land occupied as a missionary station to each religious society to which such station belongs." And this construction is strengthened rather than otherwise by reference to the surrounding circumstances. For some years prior to the passage of the act of August 14, 1848, there were three religious societies engaged in missionary labors among the Indians in Oregon—the Methodist Episcopal, the Presbyterian, and the Roman Catholic. The first missionaries of the former came to Oregon with Weyth, in 1834, and established a mission at Wallamet, below Salem, which was afterwards removed to the latter place. Subsequently their numbers were increased, and they established missions at The Dalles, Nesqually, and Clatsop. The Presbyterian missionaries came to the country under the auspices of the American board in 1836, and established a mission at Wailatpu, near what is now called Walla Walla, with Marcus Whitman at its head. Afterwards they established missions at Lapwai and Spokane—all east of the Cascade mountains. The Roman Catholic missionaries came from Canada with the Hudson Bay train in 1838. They established the mission of St. Paul, in the Wallamet, near Champoege, and Cowlitz, on the Cowlitz river. Later they established missions in eastern Oregon, and held occasional missionary services among the Indians at many points in the country. In June, 1848, they established a mission at The Dalles, to the west and adjoining the land in controversy.

The country in which these grants were made was an immense territory, extending from the forty-second to the forty-ninth parallel of north latitude, and reaching from the Rocky mountains to the Pacific ocean. Outside of these missions and the Hudson Bay posts, practically, it was unoccupied, except sparsely in the Wallamet valley. The missionaries

were very properly regarded as having promoted the settlement and civilization of the country, and there was no reason why, if congress saw proper to recognize their services either as settlers or missionaries by granting them the land occupied by them as mission stations, it should confine the grant to one station to each society when more were occupied by it.

It is also insisted that this patent is void, as not having been issued upon "a plat of survey thereof" approved by the surveyor general, but upon the survey made by the agent of the mission in June, 1850. I think it is plain that a patent issued upon a survey or diagram not approved by the surveyor general would be void. For instance, a patent could not lawfully issue upon the survey of the claim by the society itself, because a survey of the grant involved the question of how much land was occupied by the mission, and within what limits. To allow the society to do this would be to make it a judge in its own case.

The grant was only of the land occupied, which might be less than 640 acres, and the surveyor general was required to ascertain the quantity and its boundaries before he could approve a survey thereof to enable the department to issue a patent therefor. When the surveyor general was authorized to hear the contest between these parties, on February 23, 1860, he directed a deputy surveyor to make a survey of the premises: (1) As claimed by the society; (2) as actually occupied by it; and (3) so as to include its improvements, with 640 acres south of the bluff, in substantially a square form. Plats of these surveys—the second one containing 87 acres—were forwarded to the commissioner by the surveyor general, with his decision that the society was not entitled to any portion of the premises as a missionary station. Neither of these "plats of survey" were *approved* by the surveyor general in the sense of the statute, because they were each made upon a hypothesis—that the society occupied the premises or some portion of them as a mission station on August 14, 1848—which he at the same time found not to be true. But on March 29, 1875, and after the decision of the secretary of

the interior, the commissioner wrote to the surveyor general advising him of such decision, and directing him to furnish that office with a "certified diagram of the claim of said society" as confirmed by the same. In obedience to this direction the surveyor general, on June 17, 1875, certified to the commissioner a diagram of the first of the three surveys, as being a plat of the survey of the Methodist mission claim at The Dalles, and upon this the patent was issued, as appears therefrom. Whatever, then, may be thought of the correctness of the survey, the proposition that the patent was issued without a plat of survey approved by the surveyor general, in the face of these facts, is not tenable.

It is also contended by the plaintiffs that if the defendant is entitled to take under the act as a missionary society at all, the grant should be confined to the land *actually* occupied by it.

This grant, unlike the one made by the donation act, is not of *the* 640 acres occupied by the donee, but of the *quantity* occupied, not exceeding that number of acres. Still it could not have been the intention of congress in the one case more than the other that the occupation of a donee should be limited to his actual enclosure and tillage. The donation act of September 27, 1850, (9 St. 497,) was in this respect a sort of supplement to the act of August 14, 1848, and did for the settlers at large what the former had done for the missionaries. It gave to the settler then residing in the territory, for himself and wife, the section of land which he had resided upon and cultivated for four consecutive years. But this residence and cultivation were not required to include the *whole* section. In fact, the actual enclosure and cultivation were often confined to a very few acres; while the remaining portion was only occupied for grazing, and sometimes hardly that.

Very early in the settlement of this country it became a cardinal rule that a settlement on the public lands should not include any more than a section. This was probably suggested by the terms of the Oregon bill introduced into the senate by Dr. Linn, of Missouri, in 1842, which, among other

things, proposed to give 640 acres of land to each white male inhabitant of the territory over 18 years of age. Prior to this time the missionaries had claimed large areas at their several stations, but as generally there was no one to dispute such claim, it mattered little one way or the other. In December, 1843, the mission at Salem was surveyed and platted at 16 sections. But on July 5, 1843, the people adopted a land law which limited the extent of a claim or settlement to 640 acres, with a proviso that any mission "of a religious character," established before that time, might contain six miles square. Or. Laws 1874, p. 50, n.

Under these circumstances I think the grant to the missionary societies ought to be construed to include 640 acres at each mission station occupied by them; that is, *claimed and used* by them, according to the circumstances of the time and place, and not in the actual occupation of any one else.

In the case under consideration there does not appear to have been any survey or marking on the ground of the boundaries or limits of the claim until June, 1850. But it was doubtless well understood by the occupants and the Indians that it should extend a certain distance in certain directions, or that it should include certain points or places,—as the improvements, the mill site, etc.,—though I do not think that it was ever expected or intended that it should extend north of the bluff, between which and the river, a distance of about half a mile, were the villages and camping ground of the Indians and voyagers up and down the Columbia river. And this brings me to the consideration of the question whether, upon the evidence, the defendant occupied this mission station so as to be entitled to the grant thereof under the act of August 14, 1848.

The evidence is somewhat meagre, and upon some points contradictory. It consists largely of the testimony of persons deeply in sympathy with the defendant, to facts and circumstances occurring 30 years ago, and scattered over a considerable period of time. The correspondence between the defendant and its agents here concerning the occupation and transfer of this station is not produced. It is presumed

to have been in writing, and within the knowledge and control of the defendant, and therefore the omission to produce it is a matter which must have more or less weight against the defendant, according to the circumstances of the case. Portions of the evidence partake of the character of hearsay, and some of it is decidedly argumentative. In considering it, it will be impossible to ignore the history of the period and place to which it relates. Reading it, then, by this light, and where it is contradictory or obscure supplementing it from this source, the material facts about the settlement and occupation of the mission station at The Dalles are these:

In the spring of 1838 the Rev. Daniel Lee and Rev. H. K. W. Perkins, under the direction of the Rev. Jason Lee, the superintendent of the defendant in Oregon, established a mission within the limits of the tract described in the patent herein, at a place then called Wascopum. In the fall of the same year it was stocked with cattle from the Wallamet valley. The place was favorably situated for trade and intercourse with the Indians and immigrants from the east—the latter usually, at this point, exchanging their wagons for boats, and often bartering their poor oxen for supplies, such as fresh beef and the like.

In 1840 Mr. H. B. Brewer went to reside there as a farmer for the mission. Perkins and Lee left the mission for the east in 1844, and the Rev. A. F. Waller joined it about the same time. Waller and Brewer remained there until the transfer of the station to Whitman, in 1847. In 1844 the Rev. George Gary superseded Jason Lee as superintendent of the Oregon mission. Apparently the society had become dissatisfied with the secular character and cost of the missionary operations, and sent Gary here to bring about a change in this respect. To this end, soon after his arrival in the territory, the various mission stations, except The Dalles, and all the mission property, consisting mainly of large herds of horses and cattle, were disposed of to members of the mission; so that after 1844 the defendant had no "mission among the Indian tribes" in Oregon except at The Dalles. Thereafter the labors of its faithful clerical missionaries, of

whom but a few remained in the country, were devoted to the growing "white settlements" in the Wallamet valley. In the language of one of them: "The finances of the Oregon mission were thus summarily brought to a close, and the mission was not only relieved of a ponderous load, but assumed a decidedly *spiritual* character." Hines' Oregon, 242.

In July, 1847, Mr. Gary was succeeded as superintendent of the mission by the Rev. William Roberts. Prior to this, and in the spring of that year, Mr. Gary had disposed of nearly all the live stock of the Dalles mission station, and was negotiating with Dr. Whitman for the transfer of the station itself. Mr. Roberts, in continuation of the policy manifested by his predecessor, followed up these negotiations until in August an agreement was made for the abandonment or transfer of the station to Whitman, together with the sale of a canoe, some farming utensils, grain, and household furniture, for the sum of \$600; and between September 1 and 10, 1847, Messrs. Waller and Brewer, the agents of the defendant, delivered the possession of the premises to Whitman, who took actual possession thereof, and placed his nephew, Perrin B. Whitman, a youth of 17 years, in charge, while he proceeded to his mission station at Wailatpu.

Dr. Whitman was not a minister, but at the time of the transfer of this station to him it was understood and expected that religious services and instruction would in some way be kept up there for the benefit of the Indians; but there was no legal obligation to that effect, nor did the defendant or its agents have any intention or expectation of returning or occupying the station, if such services and instruction were not furnished or otherwise. In pursuance of the settled policy of the defendant, the station was absolutely and unqualifiedly abandoned to Dr. Whitman, without any reservation or right to resume the possession under any circumstances. Dr. Whitman, whatever his purpose may have been in regard to the Indians, purchased the station primarily for himself and nephew, Perrin B., to whom he promised the west half of it if he would remain and take care of it until the spring, when the former intended to return there and make it his

permanent home. At the time the defendant abandoned this station there were about 70 acres under some kind of enclosure, about one-half of which had been under cultivation. There were six moderate-sized buildings upon the premises, a dwelling, meeting, school, and storehouse, barn and workshop, built of logs, except the dwelling, which was a frame filled in with adobe. The buildings were plain, and constructed mostly with Indian labor, and did not cost to exceed \$4,000, at which valuation they were afterwards—on June 16, 1860—paid for by the United States, upon the claim and estimate of the defendant to that effect. See H. of R. Rep. No. 145, 2d Sess. 35th Cong.; 12 St. 44.

On November 29, 1847, Dr. Whitman and others were murdered at Wailatpu, by the Indians of that station, and this was followed by what is known as the Cayuse war, in which the people of Oregon, under the provisional government, undertook to chastise the Cayuse Indians for this massacre. By midsummer of 1848 hostilities had ceased and peace was established, and in the latter part of the summer the troops were withdrawn from the country and returned to their homes.

About December 16th, Perrin B. Whitman, who had remained in charge of the station at The Dalles, being apprehensive of danger, left for the Wallamet valley, taking with him Mr. Alanson Hinman, whom his uncle had sent there from Wailatpu in October as a farmer and housekeeper. A detachment of volunteers soon after occupied the premises, with the permission of said Whitman, and it remained in the possession of the troops of the provisional government until they were withdrawn from the country as stated. Thereafter, the premises remained unoccupied, except occasionally by passing travelers and immigrants, until the spring of 1850, when a military post was established there by the United States, and the premises included in a military reserve.

There never were any Indian hostilities at The Dalles of a general or serious nature, or within 100 miles of the place. The immigrations of 1848 and 1849 came through the country without molestation; and from early in 1848 there

was no more *danger* of Indian difficulties or hostilities at The Dalles, than there was prior to September, 1847.

In the spring of 1849 the news of the passage of the organic act, with the clause making a grant to missions, reached Oregon. The death of Whitman had prevented the occupation of the station at The Dalles by him, either for himself or as the agent of the American Board, or both. The draft of \$600 which he had given upon the board in payment for it had never been presented. Whatever might be thought of the claim of the defendant there could be no ground for claiming the premises as a place *ever* occupied by the American Board as a mission station. Thereupon, about the last of February or first of March, 1849, an arrangement was made between the superintendent of the Oregon mission and Messrs. Elkanah Walker, Henry H. Spaulding, and Cushing Eells, three missionaries of the American Board, by which the station was retransferred to the defendant and the draft aforesaid cancelled; and this was done by the defendant, not with any view of resuming missionary work there among the Indians or otherwise, but solely to enable it to claim and obtain, if it could, a grant of the premises from the United States on account of its occupation prior to September, 1847, and the subsequent circumstances. To the same end, and to assist it in obtaining damages from the United States for taking a portion of the station as a military reservation, the defendant, on February 28, 1859, obtained from the American Board a formal deed of quitclaim to the premises; although, on November 3, 1858, Messrs. Walker and Eells, professing to act upon a power to them from said board, dated February 28, 1852, for a nominal consideration, had conveyed the premises, subject to the military reservation, to Messrs. M. M. McCarver and Samuel L. White.

Upon this state of facts there is no ground to claim that the defendant acquired the title to this station on August 14, 1848, under the act of that date. It had abandoned the place voluntarily, and without any expectation or intention of returning, and was no more within the purview or operation of the act than if it had never been upon the ground. The

grant only applies to such stations as were occupied on August 14, 1848. To occupy is to possess, not *constructively* but *actually*. The word is of more limited signification than possession. It is derived from *ob* and *capio*—to lay hold of—and means to possess by having hold of or being actually upon the thing possessed, continuously and exclusively. Therefore, there can be no such thing as *constructive* occupancy. But when one has the complete legal title to land, and is therefore entitled to the possession of the same in law, he is deemed to have it. *U. S. v. Arredondo*, 6 Pet. 743. But prior to August 14, 1848, there could be no such possession of lands in Oregon, because the legal title was in the United States. Occupancy or actual possession was the only interest any one then had in lands in Oregon, and when that was given up or abandoned, the relation of the party to the land was absolutely terminated, and it was open to occupation by the next comer as though the foot of man had never been upon it. *Lownsdale v. City of Portland*, 1 Dedy, 1.

Prior to August 14, 1848, the only interest which the defendant had in the premises was that of occupancy or actual possession. It therefore could have no constructive possession of the land. If this actual possession or occupancy existed at the passage of the act making the grant, the title of the United States was then and thereby and on that occasion vested in the defendant, but not otherwise. The act makes the grant to take effect, not upon an occupation which preceded or followed it, but upon that which was contemporaneous with it. The grant was made upon the condition precedent that the defendant was then in the occupation of the premises. Intention or desire to occupy is of no avail; and for the want of this occupation there is no excuse or equivalent. Even taking the view of the matter sought to be maintained by the defendant, that it was prevented from occupying the premises on August 14, 1848, by Indian hostilities, still the case clearly falls within the ruling in *Ford v. Kennedy*, 1 Or. 166, in which it was held that the grant in section 4 of the donation act of 640 acres of land to married persons who had resided upon the same for four years prior

thereto, or to their heirs in case of their death before the patent issued, did not include the heirs of married persons who had died before the passage of the act, because, by the terms thereof, the grant was limited to persons residing in the territory at the time of its passage, then in being. So, in this case, the grant only applies to stations *then occupied* for missionary purposes; and if for any reason a station was not then so occupied, it is not within the purview of the act, it matters not now long or how effectively missionary operations had been carried on there at some former period. The station at Wailatpu would in all probability have been occupied by the Presbyterian society on August 14, 1848, but for the massacre of the missionaries there on November 29, 1847. But this fact did not excuse or was not equivalent to such occupation. Therefore, in the passage of the act to organize Washington territory, passed March 2, 1853, when congress had this subject before them with reference to the missionary stations in the proposed territory, the grant was repeated in the terms of the Oregon act, with the addition of the words, "or that may have been so occupied as missionary stations prior to the passage of the act establishing the territorial government of Oregon." This change was manifestly made to meet the case of the Wailatpu mission, which was not occupied as a mission station on August 14, 1848, and upon the theory that for want of such occupancy it was not granted by the Oregon act to the society which Dr. Whitman represented during his residence upon it, prior and up to the time of his death. But such want of occupancy being neither the result of a voluntary abandonment or a fleeing like the hireling from the wolf, but of the death of the faithful occupant at his post by Indian treachery and violence, congress was induced to extend the terms of the grant so as to include that case.

But, as has been shown, there is not the slightest ground for saying that The Dalles station was abandoned by the defendant's missionaries on account of fear of the Indians, or that such cause prevented its occupation by them in August, 1848. On the contrary, they deliberately abandoned it with-

out any intention of returning, because of a change of policy on the part of the society; and if the act of 1848 had not contained the clause making the grants of mission stations as it did, it is morally certain that we would never have heard of this manifest afterthought, that Whitman was to keep up the missionary work at The Dalles, in some sense as the representative of and for the defendant, and that upon his death the station would have been re-occupied and held by it as a mission but for fear of the Indians.

But it is urged that congress has recognized the validity of the defendant's claim to this land by the passage of the act of June 16, 1860, (12 St. 44,) "for the relief of the missionary society of the Methodist Episcopal Church," which provided that there should be paid to said society "the sum of \$20,000, upon filing in the proper department a release to the United States, to be approved by the attorney general, of all claim to the land embraced within the limits of the military reservation at The Dalles, in Oregon territory, and of all claim for damages for destruction of property on or near the said land by the United States troops or volunteers or Indians at any time anterior to the date of said release."

To fully comprehend the motive and scope of the act it is necessary to state that in 1854 the military reservation at The Dalles, which had covered a number of square miles, was, by an order of the war department, reduced to 640 acres, to be laid off in such a manner as least to interfere with private rights. In the execution of this order only 353 acres of the mission station, as surveyed in 1850 by the defendant, including all the improvements thereon, were embraced in the reservation. The society availed itself of this circumstance, and at once asked for compensation. The matter was referred by the department to Major G. J. Raines, then the post commander at the Dalles, who reported in favor of paying the society the sum of \$20,000. On January 28, 1859, the house committee on military affairs also recommended such payment, which was to be in full satisfaction of the claim for the land, and also one for \$4,000 for the destruction of property upon the claim. The committee state in

their report that it appears from the evidence that the society was in the "possession" of the land on August 14, 1848, and that, as soon as the danger from Indian hostilities admitted, it endeavored to "re-occupy" the premises, but the United States "troops had ere then taken possession" and included them in the military reservation.

The committee seem to have avoided saying that the society was in the *occupation* of the premises on August 14, 1848, but chose the more indefinite and convenient term "possession." In passing the bill, however, congress made no declaration on the subject. This is one of the matters alleged in the answer, which was excepted to as impertinent. So far as these suits are concerned, it only amounts to this: Upon the *ex parte* representations of the defendant, congress was induced to pay \$20,000 in satisfaction of its claim for one-half of the premises, and the value of the improvements thereon, whether destroyed by the volunteers under the provisional government, the Indians, or the United States troops, and estimated by it at \$4,000. As has been stated, no reasons were given by congress for the passage of the act, but, in fact, various ones may have and probably did influence the action of members in favor of the appropriation.

Probably the strongest consideration in its favor was the fact that although the defendant might not have been in the occupation of the station in August, 1848, still it had maintained a mission there for nine years prior to September, 1847, during a portion of which time the title to the country was in dispute, and therefore there was a strong equity in favor of its receiving some compensation in either land or money. Again, the very fact that the defendant is the representative of a popular and powerful religious organization, for whose good will and favor the average congressman in Oregon and elsewhere has a lively regard, may not have been without its effect on the result.

But, be this as it may, the action of congress in making provision for the payment of this claim cannot, under the circumstances, have the effect to invest the defendant with the title to the premises. In legal effect, all that was done

amounted only to a release by the defendant of its right, if any, to the one-half of the claim occupied by the military, and for damages for the loss or destruction of property, which is not even an admission by the United States, to whom the release was made, that the releasor, the defendant, ever had any right to either, but only that it asserted some kind of claim thereto, which it was deemed expedient to satisfy and extinguish. *Bright v. Rochester*, 7 Wheat. 548; *Watkins v. Holman*, 15 Pet. 53; *Croxall v. Shered*, 5 Wall. 287; *Merryman v. Bourne*, 9 Wall. 600.

Besides this, one of the plaintiffs and Bigelow, under whom the others claim, had already acquired rights in the premises under the town-site and donation acts, which congress could not deprive them of, even if they had been parties to this proceeding which resulted in the payment to the defendant. Congress has the power to dispose of the public lands, and to make compensation for private property taken for public uses, but it has not judicial power, and therefore cannot finally determine conflicting claims to land, although arising under its own grants or laws.

But, since this payment to the defendant of \$20,000, there is no longer any cause for regarding it as even morally entitled to anything from the public on account of its missionary operations at The Dalles. In 1847, when the place was abandoned by the defendant, it had no market value, because, there being no white people east of the Cascade mountains, except a few Presbyterian and Roman Catholic missionaries, there were no other purchasers for it; and, rather than let it fall into the hands of the latter, it was disposed of to Dr. Whitman for \$600. And it appears that he was induced to make the purchase, even at that figure, as much to prevent the "priests" from getting hold of the position as anything else. In 1850, when the claim was taken by the military, it probably could not have been sold with a good title for \$1,000; and even as late as 1854-5, when the town had commenced to grow, the sum paid the defendant by the United States for the one-half of it was probably more than double the value of the whole of it.

The conclusion of the court is that the defendant did not occupy the premises on August 14, 1848, as a missionary station or otherwise, either by itself or the American Board, and that it was not deterred from so doing by the danger from Indian hostilities, but voluntarily abandoned the same before September 10, 1847, without any intention or expectation of re-occupying it under any circumstances, and therefore the patent therefor to the defendant was wrongfully issued; and the decree of the court will be that the defendant be declared a trustee for the several plaintiffs herein, for so much of the premises described in the patent as is claimed by them in their several suits, and that the defendant, within 90 days, by a sufficient conveyance or conveyances, containing proper covenants against its own acts, to be approved by the master of this court, release to the said plaintiffs, accordingly, all right and title to said premises, and that it pay the plaintiffs their costs and expenses of suit.

UNITED STATES v. BIXBY.

(District Court, D. Indiana. April 4, 1881.)

1. EMBEZZLEMENT—ASSIGNEE IN BANKRUPTCY—REV. ST. § 5504.

While an assignee in bankruptcy is an officer of the court, he is not an officer within the purview of section 5504, Rev. St., defining the offence of embezzlement by court officers, and there seems to be no other statute embracing assignees in bankruptcy for the specific offence of embezzlement.

Indictment for embezzlement by assignee in bankruptcy.
Motion to quash.

C. L. Holstein, U. S. Att'y, and *L. H. Richardson*, Ass't,
for the United States.

Gordon, Lamb & Shepherd, for defendant.

GRESHAM, D. J. The defendant is indicted for embezzling funds which came into his hands as assignee of several estates in bankruptcy. The indictment is based upon section 5504 of the Revised Statutes, which reads as follows:

"Every clerk or other officer of a court of the United States, who fails forthwith to deposit any money belonging in the registry of the court, or thereafter paid into court, or received by the officers thereof, with the treasurer, assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court, or who retains or converts to his own use, or to the use of another, any such money, is guilty of embezzlement," etc.

It is only such moneys as are required to be deposited with the treasurer, assistant treasurer, or a designated depository of the United States, in the name and to the credit of the court, that an officer can be guilty of embezzling under this section. An assignee in bankruptcy is an officer of the court, but the funds of the estate which come into his hands are not required to be deposited in any of the places designated in this section, in the name of the court and to its credit.

It is provided in section 5059 of the Revised Statutes that the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank, in his name as assignee, or otherwise keep it distinct from all other money in his possession. The acts charged in the indictment are not covered by section 5504, Rev. St., and there seems to be no other statute making it embezzlement for an assignee in bankruptcy to convert to his own use trust funds which come into his hands. The motion to quash is sustained.

YALE LOCK MANUF'G Co. and others v. NORWICH NAT. BANK.

SAME v. NEW HAVEN SAVINGS BANK.

(Circuit Court, D. Connecticut. March 29, 1881.)

1. RE-ISSUE No. 8,550—IMPROVEMENTS IN TIME LOCKS—NOVELTY.

Re-issued letters patent No. 8,550, for improvements in "time locks," by which the multiple bolt-work of a safe or vault door could be automatically both dogged or locked and unlocked at predetermined times,—the dogging and releasing being caused by the operation of the time mechanism, and the time for locking or unlocking being capable of alteration at the will of the operator, without disturbance of the clock-work,—contained, *inter alia*, the following claims:

"(1) The combination of independent multiple bolt-work with the time mechanism and locking or dogging mechanism of a time lock, automatically both dogging and releasing the bolt-work at predetermined times, substantially as described."

"(7) In a time lock the combination, substantially as above set forth, of the time movements and two adjustable devices, one for determining the time of locking and the other of unlocking."

Held, that the language of the seventh claim was not to be extended so as to include time movements which were used for any obstructing purposes whatever, but was to be considered as referring to the time lock of the specification only.

2. SAME—SAME—SAME.

Held, therefore, that such claim was not anticipated by a patent for a structure containing two similar adjusting devices, which were operated to open and close a gas-cock much after the plan of the patented lock.

3. SAME—INVENTION.

Held, further, that the changes necessary to transform old time locks which unlocked at predetermined times into structures which should also lock at predetermined times, required the exercise of inventive power.

4. SAME—SAME.

Held, further, that the application to safe doors of chronometric mechanism for automatic locking and unlocking at predetermined times involved invention.

5. SAME—INFRINGEMENT.

Held, further, that where a lock has two adjustable devices for locking and unlocking automatically at predetermined times, which are the equivalents of the mechanism of the patented lock, infringement is not avoided by the mere fact that the infringing lock can also be used as an instant locker.

6. SAME—SAME.

Held, further, that the mere use of such infringing lock constitutes an infringement, although it has only been used as an instant locker.

7. PATENT NO. 173,366—IMPROVEMENT IN TIME LOCKS—MECHANICAL DEVICE.

Letters patent No. 173,366, for improvement in "time locks," by isolating the adjusting devices from the winding devices, and by excluding from the adjusting devices the person who winds the clocks, except when he is allowed the use of the key to the supplemental clock by which the adjusting devices are secured, contained, *inter alia*, the following claim: "In combination with the case of a chronometric lock, having a lid or door for covering the devices which control the hours of locking or unlocking, one or more winding devices, whereby, the lock being attached to the safe door, the time mechanism can be wound from the exterior of the case while the safe door is open, but is inaccessible when said door is closed." *Held* that, so far as this claim was concerned, the alleged invention consists in simply securing the door of a time lock with a key, and in providing such door with an aperture through which the clock could be wound, and that in view of the Rutherford clock, the watchman's time detector, and even the clocks and watches in common use, the improvement did not involve invention, and could only be regarded as mechanical.

8. RE-ISSUE NO. 7,947—APPLICATION OF TIME AND COMBINATION LOCKING MECHANISM TO THE BOLT-WORK OF A SAFE DOOR—COMBINATION—PATENTABLE RESULT.

Re-issued letters patent No. 7,947, for an improvement in a combined time lock, combination lock, and bolt-work for safe and vault doors, claimed, *inter alia*, "the combination with the bolt-work of a safe or vault door of a combination or key lock, controllable mechanically from the exterior of the said door, with the time lock, having a lock bolt or obstruction for locking and unlocking, controllable from the interior of the door, both of said locks being arranged so as to rest against, or connect with, the bolt-work—the time lock being automatically unlocked by the operation of the time movement; both of the said locks being independent of each other, and arranged to control the locking and unlocking of the bolt-work, so that said safe or vault door cannot be opened when locked until both of said locks have been unlocked, or have released their dogging action to enable the door to be opened, substantially as described." *Held*, that this combination produced a new result, and was therefore patentable.

9. RE-ISSUE—ABANDONED CLAIM.—*Leggett v. Avery*, 101 U. S. 256.

Held, further, under the circumstances of this case, that this claim was not within the scope of the language employed in *Leggett v. Avery*, 101 U. S. 256, in relation to the invalidity of a claim in a re-issue which had been abandoned, or rejected with the acquiescence of the patentee, upon the original application for letters patent.—[ED.]

Edmund Wetmore, Causten Brown, and Geo. Ticknor Curtis,
for plaintiff.

Samuel A. Duncan and Benjamin F. Thurston, for defendants.

SHIPMAN, D. J. The suit against the Norwich National Bank is a bill in equity, founded upon the alleged infringement of three letters patent now owned by the plaintiffs, viz.: re-issued letters patent No. 8,550, issued January 21, 1879, to the Yale Lock Manufacturing Company, as assignee of Samuel A. Little, the original patent to Little having been granted January 27, 1874; letters patent No. 173,366, granted February 8, 1876, to the said company, as assignee of Emory Stockwell; and re-issued letters patent No. 7,947, to James Sargent, dated November 13, 1877, the original patent having been dated September 25, 1877. The first two patents are for improvements in "time locks;" the third patent is for an improvement in a combined time lock, combination lock, and bolt work for safe and vault doors. The bill in equity against the New Haven Savings Bank relates only to the first two patents.

The object of the Little invention was to furnish a time lock by which the multiple bolt work of a safe or vault door could be automatically both "dogged," or locked, and unlocked at predetermined times; the dogging and releasing being caused by the operation of the time mechanism, and the time for locking or for unlocking being capable of alteration at the will of the operator, without disturbance of the clock-work. Before this invention, automatic unlocking at a predetermined time, and locking whenever the door was shut and the bolts were thrown, were known. No arrangement of time mechanism had been applied to a safe door by means of which locking would take place automatically at a predetermined time. Time locks which lock by the operation of time mechanism after the bolts have been thrown are called after-lockers. Locking at the time when the bolts are thrown is called instant locking.

The inventor says in his specification: "I provide adjustable devices, so that the periods when the lock shall be locked and unlocked may be varied at will; and I also provide a

device whereby, at certain intervals,—say on every seventh day,—the lock will remain locked during the time when ordinarily it would be unlocked.” In order to give a more clear idea of the “adjustable devices,” and the means for actuating the dogging mechanism, I quote the following description, which I believe to be accurate:

“The time movement revolves a compound disk, composed of two single disks of the same shape and size, placed face to face on a common axis, each having an equal portion of its periphery cut away so as to leave in each a depression of the same form and size as that in the other. When these two disks or wheels are fastened together by a thumb-screw they form one wheel or dial, having a depression in its periphery.

“The inner wheel is adjustable on the common axis relatively to the other. The depression in the periphery of the double disk, caused by the cutting away of the periphery of each of the single disks, can be made longer or shorter, therefore, according to whether the inner disk is turned so that its cut-away portion is more or less in coincidence with the cut-away portion of the outer disk or dial. The outer dial is adjustable relatively to the time movement, because the ratchets in the time movement permit it to be moved by hand in the direction it is carried by the time movement, just as the hands of a clock may be moved forward by hand.

“One end of a bent pivoted lever rests upon the edge of the double disk or dial, and the other end supports a “dog,” pivoted to the side of the safe in such a position that its pivotal movement brings it behind or away from the multiple bolt work. When the ‘dog’ is behind the bolt work the latter cannot be thrown back, and the door is held locked. When it drops down out of the way of the bolt work the bolt work is free to be retracted and the door may be opened.

“When the double disk revolves, and the shoulder at one end of the cut-away portion of its periphery comes under the lever, the lever drops, and when the shoulder at the other end of the cut-away portion comes under the lever, it lifts the lever up, and, as the other end of the lever supports the ‘dog,’

the 'dog' is oscillated in correspondence to the movements of the lever. Thus the revolution of the disk causes the 'dog,' through the medium of the lever, to alternately move into or out of the locking position. By moving the outer disk by hand, it may be turned so that the shoulder which lifts the 'dog' through the lever into the locking position shall come under the end of the lever at any desired hour, and by loosening the thumb-screw and turning the inner disk to any desired position, and then screwing the disks again together, so that they move as one, the cut-away portion of the compound disk may be lengthened or shortened, so that the shoulder, which allows the 'dog' to drop into the unlocking position, may be made to come under the lever, as the dial revolves, at any desired hour thereafter."

The re-issue contains 17 claims, of which the first and seventh only are alleged to have been infringed. These claims are as follows:

"(1) The combination of independent multiple bolt work with the time mechanism and locking or dogging mechanism of a time-lock, automatically both dogging and releasing the bolt work at predetermined times, substantially as described.

"(7) In a time lock the combination, substantially as above set forth, of the time movements, and two adjustable devices, one for determining the time of locking and the other of unlocking."

The defendant, denying infringement, strenuously urges the defences of want of novelty, and want of patentability or non-invention.

There were in the art, prior to Little's invention—(1) Time locks which opened a safe at a predetermined time, and which were instant lockers. The prominent examples of this class were the Rutherford lock, the Pye lock, and the Derby patent. (2) Time locks which were instant lockers, and never had been used as subsequent lockers, but which it is now said could have been made subsequent lockers by the appliances within reach of mechanical skill. The Derby patent is the one which is relied upon. (3) Chronometric movements, capable, at predetermined times, of opening and closing a gas-cock,

the periods of opening and closing being adjustable relatively to each other. The Herzberg patent and the Paine self-illuminating clock are the members of this class. (4) The Cope patent, which was, for time mechanism, capable of being applied to open and close at predetermined times, the periods of opening and closing being adjustable relatively to each other, the door of a bee-hive.

As has been stated, no time lock or time mechanism had been applied to dog and release the bolt of a safe door at predetermined hours, and capable of being adjusted relatively to each other without disturbance of the mechanism of the clock. This fact compels a finding in favor of the novelty of the patented structure unless the seventh claim should receive a construction which would include the chronometric devices which had been applied to very different structures, such as a gas pipe or a bee-hive, but does not compel a conclusion in regard to the patentability of the Little structure, or the question whether it was a new invention.

If the words "in a time lock," in the seventh claim, were omitted, or if "time lock" simply means chronometric mechanism whereby an obstruction can be interposed or removed, then the Herzberg patent is an anticipation of that claim. The Herzberg structure contains two similar adjusting devices, which are operated to open and close a gas-cock much after the plan of the Little lock. But it is a strain upon language to construe the time lock of the patent to mean chronometric movements which can obstruct the flow of gas or the arrival and departure of bees from a hive. The object of the invention was "a time lock which shall dog and release the multiple bolt work of a safe or vault," etc. It was a chronometric lock which was to be used as a *lock* to bar the opening of solid doors against the violence of skilled burglars, and therefore, when the various sub-combinations of the invention are specified in the different claims, the language is not to be extended so as to include time movements which are used for any obstructing purposes whatever, but is to be considered as referring to the time lock of the specification only. As thus construed, the seventh claim means the combination in

a time lock, which is a structure necessarily having a dog, which is to be moved by appropriate mechanism, of the time movement, and two adjustable devices, substantially as set forth. The Herzberg patent does not anticipate the seventh claim of the Little invention. Whether it destroys the patentable character of the Little invention will be hereafter considered.

But, although the Little device may have been novel in the sense that it was a new improvement, and although it possessed utility, it is insisted that it was not a patentable improvement because there was no invention in the thing, and improvement is not necessarily invention.

The Derby patent is first relied upon to show that while changes were necessary to transform old time locks which unlocked at predetermined times into structures which should also lock at predetermined times, yet that such changes were obvious to the skilled safe lock-maker, and required no inventive power. The prominence which was given to this patent in the proofs and on the trial requires a description of the mechanism. The patentee says, in his specification: "The nature of my invention consists in securing to the inside of the door a bar or series of bars, or cross-bars, so arranged as to revolve on one common center, which is fastened in the door in such a way as to permit a handle or knob being attached to it on the outside of the door to latch the bars when the door is closed; also the mode of constructing and operating a spring latching lever by means of a simple clock movement, so that, however ponderous the locking bars may be, the power of an ordinary clock movement will be sufficient for the purposes required." The latching lever is pivoted to the side of the safe, and keeps the series of cross-bars in locked position. "This lever is shaped like an inverted V, pivoted at the apex, and with one arm longer than the other. It is pivoted so that the short arm latches over the top of one of the cross-bars when the latter have been turned into their sockets, and holds it there against its tendency to swing up out of engagement with the socket. The long arm of the lever projects down just behind a dial, which is revolved by a clock

movement. There is a series of holes all around the dial near its circumference. A pin is inserted into one of these holes and projects from the back of the dial, so that it is brought into contact with the long arm of the lever by the revolution of the dial. The whole lever being rigid, the pin, acting on the long arm, pushes it one side, and so unlatches the cross-bars, which immediately swing out of the sockets, and the door is unlocked. By putting the pin in different holes, the time when it is brought in contact with the lever, and hence the hour for unlocking, may be varied."

This device was intended merely for unlocking, but Mr. Shepard, one of the defendants' experts, says that "if it was desired to hold this lever out of its locking position for a certain number of hours, and at the same time have it under such condition that it would be released and fall into place after a certain number of hours, without returning to the safe to manipulate it, then duplicate pins might be employed and placed in several of the successive holes." The witness is aware that there is no mention in the patent of more than one pin for the disk, but does not think that there is invention in the addition of duplicate pins, and thereafter much strength was spent in the investigation of the earnestly-disputed question whether the alterations necessary to make a locking device were compatible with the construction of the Derby mechanism, as shown in the patent and drawings. It is manifest that the patent which was issued in 1858 shows no conception of a locking device; that to add one which shall be efficient, alterations must be made in his mechanism, and that nobody produced a lock of this kind until Little's invention came into being in 1874. Assertions by ingenious and able experts in the year 1880, after invention in safes has been greatly stimulated, of what could have been done by mechanical skill prior to 1874, do not press with great weight upon my mind.

There is a class of improvements which are plainly and obviously mechanical in their origin. An instance of this class will be noticed hereafter. But when the subject of investigation is an alleged invention of complex mechanism,

both new and useful, in the construction of which alterations had been made in previous structures of which their authors had not apparantly conceived, and the alleged invention relates to mechanism in which advances have been made since its date, the conclusions of witnesses as to non-invention, if admissible at all, are to be received with hesitation, because it is, in a large class of cases, difficult for them to place their minds in the condition of the person who was groping his way towards the development of what is now plain, but was then unknown. Such testimony has not a sufficiency of power to satisfy the mind that what history indicates did demand thought, and the peculiar power which is styled "invention," could have been accomplished by the skill of the trained mechanic.

The defendant next insists that the Herzberg gas regulator and the Paine illuminating clock and the Cope bee-hive sufficiently pointed out and explained the use of chronometric mechanism for automatic locking and unlocking at pre-determined times; that there was no invention in applying the same mechanism to the door of a safe.

In *Tucker v. Spaulding*, 13 Wall. 453, an action at law to recover damages for the infringement of a patent for the use of movable teeth in saws and saw plates, the circuit court had excluded a prior patent of one Newton for cutting tongues, grooves, mortises, etc., which patent had cutters of the same general shape and form as the saw teeth of the plaintiff's patent. The supreme court said: "The court, in rejecting the patent of Newton, seems to have been mainly governed by the use which was claimed for it, and also that no mention is made of its adaptability as a saw. But if what it actually did is in its nature the same as sawing, and its structure and action suggested to the mind of an ordinarily skilful mechanic the double use to which it could be adapted without material change, then such adaptation to the new use is not a new invention, and is not patentable."

For the purposes of this case it may be admitted that the opening and closing of a gas-cock, or any other obstruction, is in its nature the same as the dogging and releasing the
v.6,no.4—25

bolt of a safe door, and that the structure and action of the Herzberg device, if examined by an ordinarily skilful safe-lock manufacturer, would have suggested to his mind that it could be applied to the bolts of a safe. The question still remains, could either the Herzberg or the Paine or the Cope inventions have been adapted to a safe without such a material change of structure as could not be made by the mere skill of the mechanic to whom the new use had been suggested? The bolt work of a safe is to be obstructed by a dog which must be connected with the adjusting devices by appropriate mechanism. The Herzberg and kindred devices, if applied to a safe door, are applied to purposes which demand a structure of altogether different character from that which turns a gas-cock or shuts the door of a bee-hive. The old mechanism was utterly unadapted to be used upon a safe door without material change; and the modifications which were required for the adaptation to the new use were not known by the ordinary mechanic when Little made his invention, and could not have been devised by mechanical skill.

The defendant insists that after a person conceived the idea of applying and had applied a chronometric movement to the door of a safe, there is not, in judgment of law, invention in applying an improved chronometric movement, also old in the art, and not the invention of the patentee, to the door of the safe. If no Herzberg or kindred device had ever existed, it would obviously have been invention to have made a time lock which would automatically both lock and unlock a door at predetermined and variable times. In such case there would be new mechanical function. The same function is introduced upon the door, when the Herzberg device is put upon it. But it may have required no inventive skill to put the old device upon the door, because mechanical skill only was requisite. If, however, it required the power of inventing to adapt and apply the Herzberg machine to the safe door so as to make it of the least value, there is all the invention which the law demands.

The remaining question is in regard to infringement. So much of the Chinnoek lock, which is the one used by the

defendant, as relates to the first and seventh claims, is thus described: The multiple bolt work of the safe door is held by a sliding dog, which holds the bolt work fast when it is thrust forward, and releases it when it is retracted. A spring in the rear of the dog tends to keep it thrust forward in the locked position. This dog is moved by a bent pivoted lever. When one arm of the lever is pressed down, the other arm moves the dog back against the force of the spring into the unlocking position, and when the pressed-down arm is released, the resistance of the other arm is withdrawn and the dog moves by the force of the spring into the locking position.

For the purpose of moving the lever, and through it the dog, into the locking or unlocking position, the lever is governed by two adjustable locking fingers, carried by a dial revolved by the time movement. Each of these fingers has a trip pin projecting from it. When one of these pins strikes the arm of the lever it presses it down, and thus moves the dog back into the unlocking position. When the other pin comes around it releases the lever, and thus permits the dog to move forward into the locking position. For the purpose of retaining the lever in the unlocking position during the interval which elapses after it has been unlocked, and before the locking pin comes around, a catch is provided. When the unlocking pin has pressed the arm of the lever down into the unlocking position, the arm passes under the end of the catch, and is held in that position. When the locking pin comes round it strikes the catch and releases the lever. The important difference between the two locks is that the Little lock can only be used as a subsequent locker, unless by the addition of some other device, as the invention specified in the patent to Emory Stockwell, No. 168,062, of September 21, 1875. The locking mechanism of the Little lock proper operated positively upon the bolt work, so that if the bolts were left retracted at the time when the locking mechanism was to operate, the dog would be held in check by the retracted bolt work, and the clock mechanism would be stopped.

The Chinnock lock may be both an instant and a subsequent locker. If the locking mechanism was set for an hour after the door has been shut and the bolts have been pushed, it is a subsequent locker. If the locking mechanism was set for an hour before the closing of the door, and the lever is tripped before the bolts are thrown, the dog will be released; but inasmuch as it is moved by the spring into the locking position, it will be prevented from yielding to the spring by the hindrance of the bolts. When the bolts are thrust forward, the dog will instantly move to its locking position, so that the lock is then an instant locker.

Infringement of the Little patent is not avoided by the fact that although the Chinnock lock has two adjustable devices for locking and unlocking automatically at predetermined times, which are the equivalents of the Little cam mechanism, yet it can be used as an instant locker. The principle of locking automatically is not affected by the instant locking. The lock is, and is used as an automatic locker at a predetermined time. The lever is tripped at the appointed time, and is ready to act upon the bolt work when the bolts are in proper position.

The other main point of alleged difference between the two locks is that the locking devices are actuated by mechanism of different methods of operation. It is said that the Little patent shows a direct combination of time mechanism with a movable dog, while the Chinnock lock has a combination of time mechanism, latching gear, and a movable dog, and the adjustable devices are in combination directly with the latching gear. "The time mechanism works on independently of the locking dog until a pin on the revolving dial trips the latch that holds the dog, whereupon the dog is shot like the bolt of a spring lock."

I do not regard the latching gear and the tripping of the latch that holds the dog as strictly a mechanical equivalent for the direct action of the cam upon the dog, but it is plain that at the date of the Little patent the Chinnock method of holding and releasing a dog was a well-known substitute for that part of the Little mechanism which performs the same

office, and therefore, so far as this mechanical combination is concerned, the latching gear and the tripping mechanism are a mechanical equivalent for the action of the cam upon the dog. *Foster v. Moore*, 1 Curtis, 291.

The point is made in the New Haven Bank case that the defendants are not infringers because they are mere users of a Chinnock lock, and, confessedly, have so used it heretofore; that it has always had the revolving pin which trips the latch lever so adjusted, with reference to the hours of closing the safe, as to act upon such lever at a time prior to the hour when, by the rules and custom of the bank, the door of the safe is closed. The defendants use the lock, but do not use it as a subsequent locker. The lock has the capacity of being so used, and the defendants have the capacity so to use it. The lock is used as an automatic locker at a predetermined hour, for the reason which has been heretofore given.

In the specification of the Stockwell patent, No. 173,366, the patentee says: "Heretofore time locks have been constructed or arranged so as to allow the person who performed the winding of the clocks free access also to the adjusting devices, by which the hours of locking or unlocking are regulated and controlled. This construction involves a source of insecurity in affording to the said person, charged with the duty of winding, facilities for the accidental or fraudulent alteration of the adjusting device. My invention obviates this source of insecurity by isolating the adjusting devices from the winding devices, and by excluding from the adjusting devices the person who winds the clocks, except when he is allowed the use of the key to the supplemental lock by which the adjusting devices are secured. * * * The cover, A¹, is hinged at a¹ to the case, and is secured by a supplementary lock, a², and is provided with apertures, JJ, (shown by dotted circles over the winding posts,) through which apertures the clocks may be wound."

The first claim, which is the only one said to have been infringed, is as follows: "In combination with the case of a chronometric lock, having a lid or door for covering the devices which control the hours of locking and unlocking, one

or more winding devices, whereby, the lock being attached to the safe door, the time mechanism can be wound from the exterior of the case while the safe door is open, but is inaccessible when said door is closed."

So far as the first claim is concerned, the alleged invention is simply securing the door of a time lock with a key, and providing such door with an aperture through which the clock can be wound. In view of the Rutherford clock, the watchman's time detector, and, indeed, the clocks and watches which are commonly in use, the improvement seems to me to have been so obviously and plainly a mechanical one, that it is unnecessary to dwell upon this part of the case.

The Sargent invention, being re-issue No. 7,947, consisted, in the language of the specification—"Third, in the combination, with the bolt work of a safe or vault door, of a combination lock, controllable mechanically from the exterior of said door, with a time lock controllable automatically for unlocking by the operation of its time mechanism; both of said locks arranged to control the locking and unlocking of the bolt work, so that said safe or vault door cannot be opened when locked until both of said locks have been unlocked, or released their dogging action to enable the door to be opened, substantially as hereinafter described."

The patentee further says: "The combination and arrangement of the time lock will be more fully hereinafter described; but it is evident that any form or construction of a time lock may be used as a part constituting one element of the combination called for in my claims. Combination or key locks have heretofore been used by bankers and others for the purpose of preventing the unlocking of the bolt work of a safe or vault door, but as such locks are 'set on' combinations, or operated by means of keys, burglars can force the holders of the 'combination' or key to unlock the combination lock or locks and thus admit of the bolt work being retracted and the door thrown open. Therefore such locks are not a safeguard against robbery. Clock locks have also been used upon safe or vault doors for the purpose of opening the door at a predetermined hour, thus placing it beyond the power of any

person, until the arrival of the appointed time, to open the door; but, so far as I am aware, such clock locks have either been used singly on a safe door, so that when said lock released the bolt work or other fastening of said door it was unlocked and the door could be opened by any one; or, in another instance, when a time movement had been combined with a combination lock in such a manner that the two really constituted but a single lock; the time mechanism constructed and provided with a lever to engage with the fence or dog of the combination lock, so that the entire mechanism of the time movement and combination lock really constituted but a single lock as aforesaid,—the result being that if violence be applied to such a lock through the dial, spindle, or otherwise, the efficiency of the time movement will be destroyed.

* * * * *

“By combining an independent time lock of the character described and a combination or key lock, I produce an effect or result which cannot be produced by a time lock alone, or by two or more combination locks together. The time lock serves as a safeguard by night, in connection with the combination lock, for holding the bolt work in a locked condition; but when the time lock releases the bolt work at the appointed hour the bolt work will remain locked, and the safe or vault door closed, until the combination lock is unlocked by the holder of the combination on which said lock is set, when the bolt work can be retracted and the door opened, thus leaving the time lock free from performing any locking action, which leaves the combination lock free for use during the day for locking or unlocking the safe or vault door—an important *desideratum* present in my invention. If the time lock present on the safe or vault door is set for holding the bolt work from the time the bank closes in the afternoon to release the bolt work at a certain hour the next morning, it will admirably and with certainty perform its office, leaving the combination lock to be opened before the bolt work can be retracted; and should the officer of the bank holding the combination be seized during the night, carried to the bank, and forced to

open the combination lock, the time lock will remain intact, and cannot be opened by the burglars or the officer in charge of the combination. Such results cannot be accomplished by a time lock alone, because, when it releases its bolt work, the safe or vault door is absolutely unlocked, and no lock present for use during the day; nor by two or more combination locks together, because the holders of the combinations may be taken to the banks and forced to open the locks. Neither can tampering with the combination lock affect the time lock. The combination lock may be punched from its position by burglars, but then the time lock, being separate and independent from it, cannot be affected or disturbed, because there is no opening through the door by which it can be reached. It is therefore superior to a lock which has the time movement combined directly with the combination lock, both forming one lock, in which case any violence to the lock work disarranges the time movement.

"Another advantage of my invention is the capability of the separate locks being applied on different parts of the safe or vault door with respect to the bolt work indifferently. The bolt work on different safe or vault doors is frequently such that the time lock and the combination or key lock cannot be applied together; but in such case the time lock may be attached at the most convenient location, as no opening through the door is requisite. The time lock can be applied with ease and facility to the doors of old safes or vaults having the combination or key lock already thereon, thus securing the advantage of a time lock and a combination or key lock without the necessity of removing the old lock. I do not claim broadly a time lock of any peculiar construction, nor do I claim two or more combination locks combined with the bolt work of a safe or vault door, as such are old and well known."

The third claim is as follows: (3.) The combination with the bolt work of a safe or vault door of a combination or key lock, controllable mechanically from the exterior of the said door, with the time lock, having a lock bolt or obstruction for locking and unlocking, controllable from the interior of

the door, both of said locks being arranged so as to rest against, or connect with, the bolt work,—the time lock being automatically unlocked by the operation of the time movement; both of the said locks being independent of each other—and arranged to control the locking and unlocking of the bolt work, so that said safe or vault door cannot be opened when locked until both of said locks have been unlocked, or have released their dogging action to enable the door to be opened, substantially as described."

The patentability and novelty of the combination which is the subject of the third claim, and the validity of that part of the re-issue, are the questions in this part of the case. Infringement is not denied. The history of the art shows, in addition to the statements made in the specification, that prior to the date of the invention two combination locks were used to dog the same bolt work; that a time lock upon the outer door and a combination lock upon the inner door of the same safe had been used, and that upon the same door a combination lock and a time lock had dogged different and independent sets of bolt work. Sargent, however, was the first to dog and release the same bolt work of a door by a time lock and combination lock acting independently of each other, the time lock being automatically unlocked by the operation of the time movement. It is useless to discuss the question of novelty, for no anticipation of the combination which Sargent put upon one door has been attempted to be proved.

The important question in the case is whether the third claim states an invention which is patentable, or whether it states a combination of old devices which is simply an aggregation and produces no new result. It is necessary to ascertain in the first place the result, if any, which Sargent accomplished. Time locks had been known but were not widely used. One disadvantage was that the owner of the safe must be present during the unlocking period or the safe was unprotected. The use of two doors, with a combination lock upon one and a time lock upon the other, involved a very heavy expense. Combination locks were extensively used upon a single door, but the "masked burglaries" which began

in 1866 proved that the knowledge of a combination could be obtained from the possessor of the key by intimidation or violence, and that when thus obtained the contents of the vault were open to the burglar. The public became alarmed, and demanded a remedy for the unexpected inefficiency. Sargent answered the demand, and placed upon the door a time lock which dogged the bolt work, and prohibited mechanical opening till a predetermined hour in the morning, and placed also, in connection with the same bolt work, an independently acting combination lock, so that although the lock was unlocked during the period when the time lock was in operation, the bolt work could not be retracted, and during the day, when time locks were not demanded, the key lock securely guarded the safe. This new device met the wants of the public. The triple combination, as it was termed, went largely into use, and its efficiency was tested and demonstrated on the occasion of the attempted burglarly of the banks in Great Barrington. The tick of the time lock proclaimed to the burglars who had compelled the unlocking of the combination lock that another obstacle must be surmounted before the door could be opened, and the scheme of robbery was abandoned. Much of the commercial success of the Sargent combination is undoubtedly attributable to the fact that he put into actual use a time lock which was far superior to its predecessors, and which had the confidence of the public. The result is that by the use of both time and combination locking mechanism upon the same bolt work of one door, the expense of an additional door and of bolt work is avoided, and both the advantages of time locks and of combination locks are had, and the most important disadvantages of each are avoided. The presence of the time lock supplies strength to the weakness of the combination mechanism, while the use of the combination lock removes one of the disadvantages of the time lock.

The argument is most strongly and skilfully pressed that each of these locks furnishes its own independent result; that each has its own separate and independent grip upon the bolt; that although they produce a combined result in

increased efficiency, this combined result arises merely from bringing two old devices into juxtaposition; that each device works out its own effect, and nothing more, and that the fruit of the union is no new result, but two old results. There is, therefore, no combination, but simply an aggregation. If the defendant is right in its premises, and no different force or effect or result is produced from the union of the several parts than from that given by the several parts, (*Reckendorfer v. Faber*, 92 U. S. 347,) and if the combined locks produce no other result upon the bolt than the sum of the two old results, then the defendant's conclusion is correct. In my opinion a new result is produced by the union. The result of all safe-lock mechanism is capacity of the bolt to resist violence under varied circumstances of danger. The result of the union of time locks and combination mechanism, when in operation during the night season, is not merely the sum of capacity of resistance imparted by the two mechanisms, but because each mechanism strengthens the weakness of the other, and by its positive advantages fills up the deficiencies of the other. The result is a product of greater efficiency than is fairly represented by the sum of the two results. The result is not a combination of two results, but a result from the combined action of two locks upon the bolt work, each acting independently, but the action of each supplying the lack of the other. On the other hand, during the day-time, when the use of a time lock would be impossible, the safe is guarded by the combination lock, and the time lock is called into action only when its activity is needed. Thus the expense of two doors or of two bolt works is avoided, and the patentee gave to the public a safe door guarded by a combination of two different kinds of mechanism. The system as applied to one door was new, and produced a resultant efficiency which is different in kind from the efficiency of either one of the old devices when acting alone.

The next point in the defence is lack of invention. This is a theoretical defence, sustained by the opinions of able and ingenious men, who had not made safe locks when Sargent was constructing his device. The facts in the history

of the art, the many and futile attempts to construct a secure safe door, the demand of the public for security against the enforced surrender of a combination, the success of Sargent's thought and experiment, the satisfaction with which his result has been accepted by the public, and the change which his work has wrought in the art of safe building, so that this "triple combination" is now very extensively used, prove that the opinions of able theorizers are at variance with history.

It is next urged that the third claim of the re-issue is void, because it was abandoned by the patentee upon the objection of the patent-office when the original application was pending. In Sargent's original application he made one broad claim. The application was rejected by the examiner, whose decision was reversed by the board of examiners. The examiner then requested that a new application be made, upon the ground that the case presented to the board was not the same case which had been presented to him. A new application was made, containing only the first two claims of the re-issue. Then followed a long and earnestly-contested litigation in the patent-office between various interfering applicants, in which apparently both patentability and priority were discussed. The Little application contained the broad claim, and the board of examiners said, at one stage of the litigation, whether this question was properly before them or not, that this claim was patentable; so that when the question came before them upon appeal from the decision of the examiner against the Sargent re-issue, the board say: "The claim in controversy is the same in substance as the first claim of Little, whose application was once in interference with Sargent, and which was admitted to be patentable by the office at the time of the declaration of the interference. The patentability of Little's claim has once been before us in the aforesaid interference, and after full argument we concluded that his claim was tenable, and held that some one who was first to combine with the bolt work on a vault or safe door, key lock and time lock, acting independently of each other but jointly upon the bolt work,

might have a valid patent therefor." These facts exclude the third claim from the decision or the *dicta* in the case of *Leggett v. Avery*, 101 U. S. 256.

I do not understand that the objection that the re-issue is for a different invention from the original was pressed by either of the counsel for the defendant. It is sufficient to say that the claims of the original were for the combination of the third claim, provided with a device whereby the bolt work may be retained in the unlocked position for shutting the door, and be automatically locked by the time lock and mechanically by the key lock when the bolt work is cast. The patentee had shown "means whereby;" but, if I have been correct thus far, the gist of his invention consisted not in that device, but in the triple combination. Other different "devices whereby" could be introduced by other inventors, which would destroy the value of his patent if it was unduly limited. As said by the board of examiners: "'Means whereby,' while being essential to the convenient use of this combination, is merely incidental to the main idea, and may be varied indefinitely without departing from the spirit and scope of the applicant's invention."

Let there be a decree in the Norwich Bank case for an injunction against infringement of the first and seventh claims of the Little re-issue, and of the third claim of the Sargent re-issue, and for an accounting; and let there be a decree in the New Haven Savings Bank case for an injunction against infringement of the first and seventh claims of the Little re-issue, and for an accounting.

THE UNION PAPER BAG MACHINE CO. v. THE ATLAS BAG CO.*

(Circuit Court, E. D. Pennsylvania. February 7, 1881.)

1. PATENT—VALIDITY OF—ANTICIPATION.

Claims 2 and 5 of re-issued patent No. 6,050, for improvement in tools for the manufacture of paper bags, held to have been anticipated by a device in use two years before the original patent.

2. SAME—PRIOR DEVICE OF ONE OF TWO JOINT PATENTEES—EFFECT OF INCORPORATING IT IN JOINT INVENTION.

That such prior device may have been the invention of one of the two joint patentees is immaterial, since it is not their joint invention; and embracing it in their patent gives them no right to its exclusive use, except in the particular combination described in such patent.

Bill in equity on account of an alleged infringement of re-issued letters patent No. 6,050, for improvement in tools for the manufacture of paper bags. The patent was originally issued to Edwin J. Howlett and Susan M. Kirk, and was re-issued to Edwin J. Howlett, as assignee. The answer denied that the re-issue was for the same invention that was described in the original patent, or that Howlett was a joint inventor, and alleged anticipation of the devices therein contained.

J. R. Bennett and *George Harding*, for complainant.

P. K. Erdman, *F. A. Lehmann*, and *J. J. Combs*, for respondent.

BUTLER, D. J. Claims 2 and 5 of the plaintiff's patent, are, very clearly, for equivalent devices. The blade B, and the plate E, are intended for separate, independent use. When the former is detached and removed, as contemplated to be when not in use, the latter supplies its place, and performs its office. Both cannot be used at the same time. Paragraph 14 of the specifications, and the testimony of the experts on each side, as well as an examination of the plaintiff's drawings and model, show that one of these devices is the mere equivalent of the other. The complaint, as exhibited by the testimony, and urged by counsel, is that the defendants have infringed the fifth claim. It goes no further.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Whether the introduction of this claim into the re-issue of the patent, where it is first found, was improper, need not be considered. From what has been said it is plain that whatever would constitute an infringement of this claim, would also be an infringement of the second; and that whatever would anticipate the latter, would also anticipate the former. The proofs show, quite satisfactorily, that a device to facilitate the manufacture of paper bags, substantially identical in construction, form and manner of use, with that described by the plaintiff's second claim, and consequently the exact equivalent of that described in the fifth, was constructed and used, more than two years prior to the application for the Howlett and Kirk patent, and nearly as long before the invention, described therein, was made. This feature of their combination, or tool as they denominate it, was not, therefore, new. That it may have been invented by Miss Kirk, is unimportant. Granting it to have been, it follows that it was not the joint invention of the patentees. Embracing it in their patent, did not, therefore, confer upon them a right to its exclusive use, except in the particular combination therein described. It is not even clear that the invention was original with Miss Kirk; and if it was, it is not clear that the use which she permitted to be made of it, would not have forfeited the right to a patent even in her own name, at the time the patent here involved, was applied for. As this view of the case disposes of it, an examination of other questions presented by the defence, is unnecessary.

The bill must therefore be dismissed. A decree will be entered accordingly, with costs.

THE BEHERA.*

(*District Court, E. D. Pennsylvania.* March 11, 1881.)

1. ADMIRALTY—CRUSHING OF BARGE IN DOCK BETWEEN TWO STEAM-SHIPS—LISTING OF STEAM-SHIP AGROUND WITH FALL OF TIDE—BURDEN OF PROOF.

A barge was forced into a dock at high water between two steam-ships. Upon the fall of the tide one of the steam-ships listed over towards the other, and the barge was crushed between them. The testimony showed that the movement of the steam-ship was caused by the fact that she was aground, and consequently, upon the fall of the tide, listed over towards the other, and that this could not have been prevented by any care on the part of those in charge of her. *Held*, that it was probable from the testimony that the barge was guilty of imprudence in entering the dock, but that, admitting the propriety of her doing so, she could not recover, since the evidence failed to show that the accident could have been prevented by those in charge of the steam-ship.

Libel by James Ward against the steam-ship *Behera* to recover damages for injuries to libellant's barge. The facts were as follows: The iron steam-ship *Behera*, 248 feet long and 34 feet 8 inches beam, having on board 1,750 tons of old rails, and drawing 22 feet aft and 20 feet forward, went into the dock at pier 39, Delaware river, Philadelphia, on June 7, 1880. On the opposite side of the dock, which was 85 feet wide, the *Matthew Curtis*, an iron steam-ship, 290 feet long, 33 to 35 feet beam, was lying, empty. On the same day libellant's barge arrived off pier 39 with coal for the *Curtis*. At 1 o'clock on the next day, at high water, the barge was pushed in between the steam-ships, and commenced unloading its cargo into the *Curtis*. There was so little space in the dock that it was with some difficulty that the barge was forced in. When the tide fell the barge became jammed between the two steam-ships and was crushed. Libellant alleged that when the barge was pushed into the space between the steam-ships the *Behera* was afloat and yielded to the pressure; that her mate offered a line to the barge, and promised to breast the steam-ship nearer to the wharf;

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

that he failed to do this, and that in consequence of this neglect, and of the lines of the Behera being slack, she swung into and crushed the barge.

The respondents alleged that the Behera entered the dock at high water, and had then to be forced in on the mud; that, owing to the bank at the side of the dock, it was impossible to moor her close to the wharf, but that her bow projected into the dock at an angle; that she was at all times aground, and with each fall of the tide listed over towards the Curtis; that when the barge entered the dock, her captain was warned by the mate of the Behera that she would be jammed; that the lines of the Behera were taut, and that the accident could not have been avoided by any care on the part of respondents.

There was evidence that the dock had a short time before the accident been cleaned out to a depth of from 21 to 24 feet at high tide, but that a city sewer emptied into it close to where the Behera was lying.

Edward F. Pugh and Henry Flanders, for libellant.

Henry G. Ward, for respondents.

BUTLER, D. J. That the libellant was guilty of imprudence in taking his barge into the dock, between the two large steam-ships lying there, seems more than probable. He had been present, awaiting opportunity to enter, for nearly twenty-four hours, and had seen the situation of the ships at low water—lying close together, their bows almost touching. He knew, as his witness, the stevedore, testifies, that he could only get in at high water, and that as the tide ran out the Behera would “list,” and press over towards the Curtis. When he entered, (at high water,) the space between the ships was insufficient to admit him, without forcing a way between them. The testimony of the stevedore, as well as his own, shows that he knew he could only remain while the water was up; and that he was doubtful of the safety of being there at all. In addition to this, the weight of the evidence, in my judgment, justifies a belief that he was warned from the Behera, before entering, that it would be unsafe to do so. I attach no importance to the circumstance

that he was offered a line from the Behera, when struggling to get in, and had become jammed; nor to what is said respecting a promise to "breast over."

But admitting the propriety of entering, the evidence still does not, in my judgment, sustain the libellant's claim to compensation, for his loss. The burden of proof rests upon him. He must show that the respondent could have kept off. The evidence not only does not do this, but, in my judgment, shows the contrary. I think it proves, with reasonable certainty, that the Behera was aground, from the time she entered until she left. The witnesses from aboard her, who alone can speak with certainty, all testify she was. The master of her tug says she was dragged in on the mud; and this was at high water. What the libellant's witnesses say respecting it, is little, if any, more than conjecture. They, generally, judge she was afloat, because they "ried her over" in pushing the barge in. It seems more probable that their effort to do this forced the Curtis (she being light) away. Although the latter vessel is said to have been moored close to the pier, it is not probable she was so close as to prevent the movement suggested. Again: the Behera's draft, forward, was 20 feet. The dock, according to the owner's testimony, had a depth when cleaned out, a few months before, of 21 to 24 feet, at high water. It would not be safe to put it above the lower of these figures; and this would be correct only when applied to the center, and parts mentioned by the assessor. Allowing for the ordinary accumulation of mud, with the increase produced by the sewer discharged where the ship lay, it is quite reasonable to believe that the depth there at high water, was less than the Behera's draft.

That the Behera had a "list" towards the Curtis, almost from the time of entering, is clear. The libellant's witnesses agree she had when the tide was down. When it was up she would straighten, until nearly even, and settle over as the water lowered. That such would be her position and action, when aground at the side of the channel, might reasonably be expected. The shelving bank at the side of the dock,

created by the support left for the pier when cleaning out, and the accumulation of mud, would tend directly to this result, if it would not necessarily produce it. In addition to this, however, the officers of the Behera, and of the tug, say there was such a bank, especially towards the front, so extensive as to force the ship several feet from the pier, on entering. These officers further testify that she "took a slight list" soon after going in, which increased as the water went down, breaking several of her lines, and carrying her over, forward, to within about three feet of the Curtis. This was her experience before the barge entered. Forced in, as it was, at high water, with no room to spare at that time, it required but a very slight increase of the Behera's "list," to bring her weight against the barge, and crush it. The libellant says he experienced no difficulty for an hour or more after entering; but when the water was running down he discovered that the Behera was pressing over; and soon after he was fast. The ship was simply repeating her movements of the preceding day and night. To his statement that the pressure was first against the lower part of his vessel—intended to show that the ship was not careening—I attach no importance. That she was careening, almost from the time of entering the dock, is fully proved. That she would do so, as the tide ran out, must I think, have been inferred, in the absence of the direct evidence produced. It is not probable the libellant paid such particular attention to the manner in which the vessels came together, as would enable him to speak with accuracy on the subject. The fact had no such significance at the time, as was calculated to arrest his attention. If, however, the statement is accurate, it does not prove, or materially tend to prove, that the ship was not careening. Where the vessels would first touch, if she was, would depend upon the shape of their hulls, and the position of the barge,—of which we are not informed. The latter may have careened towards the Curtis; and in view of the work being done on that side, it is not improbable she did—(it is certain the Curtis careened to her); and this of itself might produce the situation described. That the immediate cause of the disaster

was the careening or "listing" of the Behera, I am fully convinced. That this careening could not be prevented is clear. There was no force at command sufficient to overcome the combined weight of the vessel and cargo, as she went over from the bank, with the receding tide. Had the cables been so taut as to allow of no motion without something giving way, something would have given way,—posts, cables, bits or side of vessel. I do not find anything to justify a belief that the officers of the Behera were guilty of any fault, contributing to the disaster. They, as well as the crew, swear she was as close to the pier as she could go; and no one can safely assert that she was not. What the libellant's witnesses say on the subject seems to be little more than guessing. In the absence of direct evidence, the *presumption* would be that she would go as near as she could, on entering. It was her interest to do so, as she intended discharging there. The circumstance that she did not get near enough to discharge, and was compelled to go elsewhere for this purpose, is persuasive evidence to the same effect.

The libellant's loss must, therefore, be regarded as the consequence, alone, of his own imprudence in entering the dock, under the circumstances, or of remaining there so long. It is proper to say that even if the Behera had floated at high water, and might consequently have been moored closer for a time, the result, in my judgment, must have been the same. So soon as the ship touched the bottom she would have slid off in the mud, and careening over, have crushed the barge. That she would have touched bottom before the time at which the disaster occurred,—if afloat at high water,—I have no doubt. The tide had then been running down for over an hour and must have fallen two feet.

The answer to Captain Hewitt to whom, as assessor, interrogatories were addressed, will be filed herewith.

The court addressed to an assessor called as a nautical expert interrogatories which with the answers thereto were as follows:

First. Supposing the statements of the libellant and Mr.

Lovett the stevedore, to be correct, as respects the situation of the ships in the dock, was it prudent to take the barge in between them, and to remain after the tide had commenced to run down? *Answer.* The libellant was very imprudent in going into the dock under the circumstances which he and Mr. Lovett the stevedore describe. He should have expected to get fast. If he stayed any length of time he almost certainly would.

Second. Are the bottoms of docks usually level from side to side, affording an equal depth of water throughout? Describe their usual condition in this respect. *Answer.* The docks when first dug or cleaned are deepest near the middle. The earth is not removed, to the same extent near the foundations of the piers. The effect of vessels settling in the mud as the tide goes down at the sides of the dock, is to slide off and form a bed and at this place on each side the water will usually be found deepest pretty soon after the dock has been constructed or cleaned out. This bed will be formed from 20 to 25 feet from the pier; the vessel in going on the bottom will slip from the pier, the condition of the bank formed near the foundation throwing her off as she settles.

Third. Considering the Behera's size and draft, (20 feet forward) and her cargo, (1700 tons) was it practicable to keep her close to the pier? *Answer.* It was not practicable to keep the Behera up to the pier. If she floated at high water she could be breasted close; but as soon as the tide ran down sufficiently to let her touch the bottom she would slip off in the mud and then probably list over. I have no doubt of this. No fasts would keep her up after she ceased to float; her weight would be on them and something must break.

Fourth. In an hour and a quarter after the water reached its height, how much would it fall off? *Answer.* The tide would fall at least two feet and most probably two and a half feet in an hour and a quarter after it had reached its height.

THE NORMAN.*

(District Court, E. D. Pennsylvania. March 15, 1881.)

1. ADMIRALTY—MARITIME LIEN—SUPPLIES FURNISHED ON THE ORDER OF CHARTERERS.

A charterer is not the agent of the owners to charge the vessel for supplies, and no lien exists for such supplies furnished upon his order and for his benefit at the port where he resides.

2. SAME—AGREEMENT BY CHARTERER TO FURNISH SUPPLIES IN PART PAYMENT.

In such case the fact that the charterer was to furnish supplies in part payment is unimportant.

3. SAME—CREDIT GIVEN TO VESSEL IN IGNORANCE OF CHARTER.

It is immaterial, in such case, that the person furnishing the supplies trusted the ship, and had no knowledge of the relation in which the person ordering the supplies stood to the ship.

4. SAME.

A coasting steamer was chartered for a foreign voyage from a port not her home port. By the charter the owners reserved the right to nominate the captain and engineers, but these officers were to be paid by the charterers, who were also to pay all the other expenses of victualling, manning, coaling, and running. In accordance with a stipulation of the charter a foreign registry was taken out at the port from which she sailed. The charterer, who resided at this port, ordered coal there, which was furnished to the vessel. *Held*, that whether or not the charterer was owner *pro hac vice*, (a question left undecided,) no lien existed for the coal, since the charterer was not the agent of the owners to charge the vessel.

Libel by the Consolidation Coal Company against the steam-ship Norman, to recover for 277 tons of coal furnished to the vessel in New York. The following facts appeared from the testimony:

The Norman was a coasting steam-ship, owned by a Massachusetts corporation, composed of residents of Boston and Philadelphia, in one of which ports she was enrolled. In November, 1878, Murray, Ferris & Co., residing in New York, chartered her for a voyage to Nassau and other ports. By the terms of the charter the charterers agreed to pay all the expenses of victualling, manning, coaling, and running the vessel, and all port charges, etc.; the owners reserving the

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

right to nominate the captain, and first and second engineers, who, however, were to be paid by the charterers. The charter also provided that a foreign registry should be taken out by the charterers in New York, which was done. Murray, Ferris & Co. ordered coal from libellants, which was furnished to the vessel at New York. Libellants testified that they furnished the coal on the credit of the vessel; that they were not informed in what relation Murray, Ferris & Co. stood to the vessel, but supposed them to be her agents.

This libel was afterwards filed to recover the price of the coal.

Thomas J. Diehl and J. Warren Coulston, for libellants.

John W. Brock and Morton P. Henry, for respondents.

BUTLER, D. J. The ordinary maritime lien for supplies is based upon an implied hypothecation of the ship; and this implication is founded on the ship's necessities and situation,—the need of supplies, and the absence from home, where the owner is without credit. As the master represents the owner, with power to hypothecate, the law implies a hypothecation whenever supplies are purchased by him under such circumstances. He is known everywhere as the owner's confidential agent. His character and position are, therefore, evidence of authority to represent the owner in all matters respecting the ship. His contract for supplies, abroad, raises an implication of lien, because of his power to pledge the ship, and the improbability of obtaining them without. "The master's contract imports a hypothecation." When at home, where the owner is presumed to have credit, and there is, therefore, no necessity for such pledge, none is implied. "To guard against misapprehension," says Mr. Conkling, "it is proper to remark that a lien is never implied from contracts of the *owner in person*, [save in foreign ports?] It is only the contracts which the *master enters into*, in his character of master, that specifically bind the ship or affect it by way of lien, or privilege." Conkling's U. S. Adm. 73-78-80; *St. Iago de Cuba*, 9 Wh. 417.

Were Murray, Ferris & Co. owners *pro hac vice*? If they were, then, the coal in question being purchased by such own-

ers, when the ship was at home, no lien can be implied. Every circumstance necessary to the implication would be wanting- This was decided in *The Golden Gate*, 1 Newb. Adm. 308. In the absence of authority, however, I think it could not be doubted. Did the charter-party constitute Murray, Ferris & Co. such owners? In other words, did it, in effect, transfer the control and possession of the ship to them? They obtained the entire use and enjoyment, and bound themselves to furnish men and supplies, at their own expense. It is not important that the language is "to pay for manning, victualing," etc. The effect is as stated. That the parties so understood, is shown by Murray, Ferris & Co.'s purchase of supplies, instead of looking to the general owners for them. The latter stipulated for the privilege of naming the captain and engineers; and the libellants consider this an indication that they retained control of the ship. On the other hand, I think it tends to show an understanding that the ship and her control, were to pass to Murray, Ferris & Co. Otherwise why insert such a provision? If she was not thus to pass, there could be no question of the general owner's right to appoint these officers, as well as the entire crew. The provision was, doubtless, intended to secure to these officers men in whose skill and care the general owners had confidence. I do not, however, deem it necessary to decide this question, of ownership. There is another ground on which the case may, I believe, be rested with entire safety.

If the ship remained in the possession and control of the general owners, (as libellants assert,) no one but her master had authority to represent them. Murray, Ferris & Co. were not their agents, and could not by any act, or contract, bind them or their property. It would not be suggested that they could pledge the ship for supplies. How then can a pledge be implied from their purchase? Their relation to the ship, (if libellants' view be accepted,) was simply that of freighters. The fact that they were to furnish supplies in part payment, is unimportant. And it is equally unimportant that the libellants may have trusted the ship. If they did, it was simply an act of folly, unwarranted and without effect. They

cannot allege imposition; it was their duty to ascertain the purchaser's relation to the ship. They knew he was not the master. This officer had nothing whatever to do with the transaction. He saw the coal coming on board, and knew that Murray, Ferris & Co. procured it, as they were bound to do. The purchase was made exclusively by these people, of their own motion, (so far as appears,) on their own account, and for their own use and benefit. Both the master and engineer say *they* had nothing whatever to do with it. They neither kept a tally of the coal, nor receipted for it,—the engineer saying that when asked to sign a receipt, he referred the individual to Murray, Ferris & Co. Not only was the coal not purchased by the general owners' agent, but it was not even for their use or benefit. It was not important to them whether the ship went on her voyage, or remained in port. The stipulated compensation for her use must have been paid, whether she sailed or remained idle. The charterers could not complain that she was without coal; they were bound to furnish it. In short, the libellants,—if their view of the contract be adopted,—are not creditors of the general owners, sold them nothing, and have no claim whatever on them, or their property in the ship.—*Beinecke v. The Secret*, 3 FED. REP. 665, and *Coal Co. v. The Secret*, U. S. C. C., S. D. N. Y., December 1, 1879 (not reported), closely resemble the case before me. There, however, the terms of the contract were somewhat different, leaving no room to doubt that the charterers were owners *pro hac vice*; and the decisions might safely have been rested on this ground.

The libel must, therefore, be dismissed, with costs.

TAYLOR and others v. INSURANCE COMPANY OF NORTH AMERICA.

(*Circuit Court, D. Massachusetts. February 26, 1881.*)

1. DELIVERY TO CONSIGNEE—TENDER OF GOODS IN HOLD OF WRECK—BILL OF LADING.

Certain consignments of goods were shipped in the bark *Almira Coombs*, and stowed in the lower hold. The bills of lading contained this clause: "To be landed in ship's lighters at risk and expense of consignees." The vessel was subsequently wrecked in the port of delivery, and a few tons of the goods taken out of the lower hold, but not the whole of any one consignment. Upon a survey of the wreck the surveyors reported that no more goods could be recovered without great expense, the hold being full of water, and that the attempt ought not to be made because the value was insufficient to justify the expense of recovering them and the risk that must thereby be incurred, and advised a prompt sale of the ship and cargo as they then lay. *Held*, that a tender to the consignees of the goods which had been landed, and an offer to deliver those still on board upon payment of the landing charges and freight, was not sufficient to entitle the ship to freight.

2. INSURERS—PROCEEDS DERIVED FROM SALE OF GOODS INSURED—FREIGHT.

Held, therefore, that insurers who had paid a total loss upon the goods, and received from the insured assignments of the bills of lading and of all their rights of salvage, were entitled to so much of the proceeds derived from the sale of the ship and cargo as represented the goods insured by them.—[Ed.]

In Admiralty.

Paul West, for appellants.

C. T. Russell and *C. T. Russell, Jr.*, for libellants, appellees.

LOWELL, C. J. The libellants insured certain consignments of goods shipped by Laforme & Frothingham and H. C. Peabody & Co. in the bark *Almira Coombs*, on a voyage from Boston to Port Elizabeth, Algoa bay, South Africa. All these goods were stowed in the lower hold. The bills of lading contained this clause: "To be landed in ship's lighters at risk and expense of consignees."

The vessel arrived at Port Elizabeth on Sunday afternoon, July 14, 1878, and on Monday the master reported his arrival, entered his bark at the custom-house, and made ar-

rangements for lighters. On the morning of the 16th there was a very severe gale from the south-east, and the ship was driven on shore and bilged. On the 17th a survey was called and the surveyors reported the vessel a complete wreck, water flowing in and out with the tide, and seven feet of water in the hold at low tide. They recommended that every reasonable measure should be taken to land the cargo. All the cargo between decks was landed, delivered, and freight paid for it by the consignees concerned. A few tons of goods were taken out of the lower hold, among which were some of those insured by the libellants, but not the whole of any one consignment. July 20th, upon a second survey, the surveyors reported that some goods had been discharged, and that no more could be recovered without great expense, the hold being full of water, and that the attempt ought not to be made because the value was insufficient to justify the expense of recovering them, and the risk that must thereby be incurred, and they advised a prompt sale of the ship and cargo as they then lay.

The captain tendered to the consignees the goods which had been landed, and offered to deliver those still on board upon payment of landing charges and freight. The consignees, who were also the absolute owners of the cargo, refused to receive their cargo on these terms, and made no objection to the sale, which was duly made by auction, and the proceeds have come into the hands of the respondents,—the owners of the ship,—and the libellants sue for so much of the proceeds as represent the consignments insured by them. They have paid a total loss upon the goods, and have received from the insured assignments of the bills of lading and of all their rights of salvage. The district court decreed for the libellants, and an assessment was made, which I do not understand to be objected to, if the principle of the decree was right. No question is made that the libellant corporation has the right to receive whatever the consignees might have recovered; but it is insisted by the respondents that the freight of these goods was earned, and was a first lien upon them, and, of course, upon their proceeds. The conclusion is sound if the premises are sound.

Had the ship earned her freight? To earn freight there must, of course, be either a right delivery, or a due and proper offer to deliver the goods to the consignees. There was no delivery, and therefore the only question is whether the master's offer to deliver the goods was one which the consignees were bound to accept. I assume that the goods remained *in specie*, somewhat damaged, but not destroyed. The few tons of goods which had been landed did not fill any one bill of lading, and the consignees were not bound to receive them unless they were equally bound for all the others.

Was the offer to deliver the whole a good offer? It seems from the second report of the surveyors that there is very great reason to doubt whether the master would have been able to fulfil such an offer. I understand it to have been made merely as a matter of form, for what it might be worth. A tender is good for nothing if the party making it is not in a condition to carry it out. But the theory of the offer was unsound. It was that, as the ship was in the port of delivery, and as the consignees were to pay the expense of the lighters, therefore, whatever it might cost to fish up the goods from the bottom of the sea and put them on board the lighters was to be paid by the consignees. The survey proves that the work would have been in the nature of salvage, and of course must be paid for at extraordinary rates. This is not the meaning of the contract. The ship's lighters were to land the goods in the way usual at that port, and all usual expenses of the landing by the lighters were to be payable by the consignees. A very good test of the point is whether the arrangement which the master had made on Monday with a company owning several lighters would hold good on Tuesday, and bind the company to land the goods from the wreck at the agreed price. Obviously it would not.

The consignees were not bound to accept or decline an offer made under these circumstances. If they declined it, the master had no greater right or interest in the goods by reason of this refusal. There is no evidence that the consignees abandoned the goods to the master for the freight. The sale was simply and very properly made for the benefit of all per-

sons interested, and was conducted in good faith, and, for all that appears, was the best thing possible. The master had no more earned his freight than if he had sold the goods for cause at a port of necessity.

Affirmed.

THE MARINE CITY.

(District Court, E. D. Michigan. April 4, 1881.)

1. BAGGAGE OF PASSENGERS—OWNERS OF VESSELS—REV. ST. § 4282.

The baggage of passengers is not "merchandise" within the meaning of Rev. St. § 4282, exempting the owners of vessels from liability for the loss of merchandise in case of fire occurring without their design or neglect.

In Admiralty.

This was a libel *in personam* by Elizabeth C. Moore against the Michigan Transportation Company, owner of the steamer Marine City, to recover for the loss of baggage upon a trip from Mackinaw to Detroit in August, 1880. The libel set forth that the steamer was burned upon the trip, and libellant's trunk, with the contents, totally destroyed. Defence, that there was no allegation in the libel that the fire was caused by the design or neglect of the owners, and that by Rev. St. § 4282, they were exempted from liability.

Alfred Russell, for libellant.

J. J. Atkinson, for respondent.

BROWN, D. J. By Rev. St. § 4282, "no owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." The libel and exceptions thereto present the single question whether the personal baggage of a passenger falls within the denomination of "mer-

chan^dise," as the word is used in this section, which is copied with slight verbal alterations from section 1 of the limited liability act of 1851. The original section extended the exemption to "any goods or merchandise whatsoever which shall be shipped, taken in, or put on board of any vessel," etc.; but in the Revision the word "goods" is unfortunately omitted, probably under the impression that the word "merchandise" was sufficiently comprehensive to include all personal property.

It is insisted by the respondent that the court ought to read this section as if the word "goods" had been retained in it, and certain cases are cited which are supposed to countenance this method of construction: *In re Long Island Transportation Co.* 5 FED. REP. 625; *U. S. v. Moore*, 11 Chi. Legal News, 140; *U. S. v. Claflin*, 97 U. S. 548.

Upon a careful examination of these cases, however, I am of the opinion that none of them can be considered authority for holding that the court can interpolate words omitted in the Revision.

Section 5596 expressly declares that "all acts of congress passed prior to said first day of December, A. D. 1873, any portion of which is embraced in any section of said Revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." It should seem to follow from this that section 4282, having been enacted in place of section 1 of the act of 1851, must be treated as "in force in lieu thereof," and hence that the exemption of the owners can only apply to "merchandise" shipped, taken in, or put on board, though it is quite possible the commissioners who prepared the Revision considered that the word "merchandise" embraced all goods or other personal property. That the Revision ought to be construed not simply as declaring what was the law on the first of December, 1873, but as changing the law in certain cases, was evidently the opinion of my learned predecessor in *Gillett v. Pierce*, 1 Brown's Adm. 553, in which he had occasion to hold that the Revision expressly gave the right of trial by jury in certain admiralty cases arising upon the lakes, notwithstanding it had never

before existed. It is true the Revision was designed simply as a re-enactment or codification of the whole body of the national statutory law, but if the legal effect of each section is to be determined by an examination of the original law from which such section was taken, it might as well never have been adopted. Errors and inadvertent omissions are inevitable in a codification of this extent. Many of them were corrected by the act of February, 1875, (18 St. 316,) and in the practical application of the Revision others will undoubtedly be discovered; but the remedy is with congress, and not in subtle and forced judicial constructions, though I fully concur in the intimation of Judge Choate in *The Long Island Transportation Co.* 5 FED. REP. 626, that "an intention to change the existing laws, which this Revision purports to re-enact or codify, is not to be presumed from trifling changes of phraseology."

We are, then, remitted to the vital question in this case: Does the word "merchandise" include the personal luggage of passengers? In the case of *Chamberlain v. West. Transp. Co.* 44 N. Y. 305, it was held, and I have no doubt properly, that baggage was included in the words "goods and merchandise" as used in the original act of 1851. But the court expressly held that it was covered by the word "goods;" and if there be any other inference to be drawn from the opinion, it is that baggage cannot be classed as merchandise. Merchandise is defined by Webster as "objects of commerce, wares, goods, commodities; whatever is usually bought or sold in trade." But provisions daily sold in market, horses, cattle, and fuel, are not usually included in the term, and real estate never. The word is also defined by Bouvier as including "all those things which merchants sell, either at wholesale or retail, as dry goods, hardware, groceries, drugs, etc. It is usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used, or which are used only by a slow consumption."

In *Tisdale v. Harris*, 20 Pick. 9, 13, the word "merchandise" was held to include in general objects of traffic and

commerce, and was thought to be broad enough to include stocks and shares in incorporated companies; but I have found no case in which it has been held to be synonymous with "goods." Indeed, in the case of the *Citizens' Bank v. The Nantucket Steam-boat Co.* 2 Story, 16, it was held that the term "merchandise" did not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value in bulk, weight, or measure, and which are bought and sold; and in the course of his opinion Mr. Justice Story remarks that no case can be found in which it has been held that a bequest of merchandise would include bank bills. "A sale of all the goods and merchandise in a certain shop would never be presumed as intended to include the personal wearing apparel of the owner, although at the time it might be deposited there." The libel in this case was for the loss of bank bills, and the learned justice held that while there was authority for the proposition that bank bills might be included in the general words "goods, wares, and merchandise," they could not be considered as "merchandise." The word certainly conveys to the ordinary mind the idea of personal property used by merchants in the course of trade, and is usually, if not universally, applied to property which has not yet reached the hands of the consumer. In common parlance, it certainly is not applied to the wearing apparel or to other personal effects, and I do not feel at liberty to give it a broader signification simply because the reason of the rule exempting the owners of the vessel from loss by fire would seem to extend to cases of baggage as well as property in transit to a market.

The exceptions must be overruled.

ALBANY CITY NAT. BANK v. MAHER, Receiver, etc.

*(Circuit Court, N. D. New York. March 27, 1881.)***1. NATIONAL BANKS—TAXATION OF SHARES—ASSESSMENT—REV. ST. § 5219.**

The restriction upon the power of a state to tax the shares of any national bank within its borders "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," (Rev. St. § 5219,) is intended to secure equality of valuation in the assessment of the stock, as well as equality in the rate of the tax after the assessment has been made.

People v. Weaver, 100 U. S. 539.

2. CORPORATIONS—TAXATION—SHAREHOLDERS.

An act for the taxation of corporations generally does not exempt individuals from assessment or taxation upon their personal property or moneyed capital invested in the shares of such corporations.

3. NATIONAL BANKS—TAXATION OF SHARES—CAPITAL STOCK—REV. ST. § 5219.

Therefore the imposition of a higher assessment and heavier tax upon the shares of a national bank than those imposed upon the capital stock and personal property of other corporations within the state does not contravene section 5219 of the Revised Statutes.

4. SAME—SAME—ASSESSMENT ROLL.

In such case, however, the failure of the assessors to place the names of the shareholders upon the assessment roll, in accordance with the requirement of the state statute, renders such tax illegal and void, although a separate list, with the knowledge of the shareholders, was kept by such assessors showing the names of all such shareholders, with the number of shares held by each, and the assessable value of all such shares.

5. SAME—ILLEGAL TAX—INJUNCTION.

The collection of such tax will not, however, be enjoined upon the application of a shareholder, upon the mere ground of such illegality.

6. SAME—SAME—SAME.

In order to prevent a multiplicity of suits, however, the collection of such tax will be enjoined upon the application of the bank, where the latter is required by the statute under which the assessment was made to retain so much of any dividend or dividends belonging to such shareholders as shall be necessary to pay any taxes assessed in pursuance of the act.—[Ed.]

In Equity.

A. J. Parker, for plaintiff.

R. W. Peckham, for defendant.

v.6,no.5—27

WALLACE, D. J. The complainant moves for an injunction to restrain the defendant from all proceedings to collect a tax assessed against various stockholders of the complainant by the board of assessors of the city of Albany. The statute under which the assessment was made requires every banking association to retain so much of any dividend or dividends, belonging to stockholders, as shall be necessary to pay any taxes assessed in pursuance of the act. The complainant's bill alleges that its stockholders have been assessed, that none of them have paid the tax, and that several of them, owning together about half of the entire capital stock of the bank, have demanded their dividends and directed the complainant not to pay therefrom the taxes assessed, and refuse to allow the complainant to retain their dividends for that purpose.

The first ground upon which the right to an injunction is placed by the complainant is that the assessment contravenes section 5219, Revised Statutes of the United States, which prohibits the taxation of shares in national banks at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. The assessment was made under the provisions of chapter 596 of the Laws of New York of 1880, prescribing a system for the taxation of banks and moneyed capital invested in the business of banking. By another act of the same year (chapter 542, Laws 1880) all corporations except banks, life insurance companies, and manufacturing companies are taxable upon their dividends, when the dividends declared during the year amount to 6 per centum or more; or when there are no dividends, or the dividends are less than 6 per centum, then the tax is to be assessed upon a valuation of their capital stock, made by the comptroller of the state in a mode prescribed by the act. Section 8 of this act exempts the capital stock and personal property of these corporations from other assessment or taxation.

It is claimed for the complainant that this latter act, respecting the taxation of corporations, subjects them to a moderate taxation, and exempts their stockholders from any

other taxation upon their stock and personal property in such corporations, while the act for the taxation of banks provides for a tax upon the shareholders, and an assessment on the value of the shares, and its operation is to impose a much heavier tax; and the bill alleges that the stockholders of the complainant are now taxed under that act at the rate of \$3.60 on the par value of their shares, making the tax of all the stockholders of the bank the sum of \$9,191, while under the general act the tax of all the stockholders would be but \$450.

The national banking act permits the shares in any national bank to be included in the valuation of the personal property of the owner of such shares for the purposes of taxation under the laws of the state where the bank is located, but grants this right of taxation subject to the restriction that the taxation "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state;" and the true construction of this restriction is that it prohibits an assessment based upon a valuation which discriminates unfairly against bank shares, and is not merely intended to secure equality in the rate of the tax after the assessment has been made. *People v. Weaver*, 100 U. S. 539. If, therefore, the laws of this state prescribe one mode of assessment for the moneyed capital of individuals invested in ordinary corporations and joint-stock companies, and another for that invested in national banks, the practical result of which is to impose a higher assessment and heavier tax upon the latter, these laws are encountered by the restriction upon the taxing power of the state which the laws of the United States have prescribed. But I am of opinion that the complainant cannot prevail upon this theory, and that shareholders in national banks are not subjected to a discrimination or rule of assessment which does not obtain as to stockholders in other corporations, because the act for the taxation of corporations generally does not exempt individuals from assessment or taxation upon their personal property or moneyed capital invested in the shares of such corporations. This act exempts

only the capital stock and personal property of such corporations and joint-stock companies from assessment or taxation.

There is a wide difference, for the purposes of taxation, between the capital stock and personal property of a corporation, and the shares held by the several stockholders. Capital stock and shares therein are distinct species of property—as distinct as real estate and the mortgage by which it may be encumbered. The corporation and its capital and property are one thing; the stockholders and their property in its shares quite another. The corporation has the legal title and right of disposition of all the corporate property, subject to the conditions of its charter. The stockholders' right is to enjoy a proportionate part of the profits, or upon dissolution of the corporation a proportionate part of the assets after payment of debts. This is a distinct, independent interest or property held by the shareholder, like any other property that may belong to him. It is this interest which the national banking act has left subject to taxation by the states, while the states are denied the power to tax the capital stock of the banking association. It probably would not have been within the constitutional power of congress to permit the states to tax the capital stock of the banks. But no one doubts the authority of congress to permit the states to tax the shares of the stockholder. And because property of shareholders in shares, and the property of the corporation in its capital, are distinct property interests, both may be taxed. *Van Allen v. The Assessors*, 3 Wall. 573; *The Delaware R. R. Tax*, 18 Wall. 206; *Farrington v. Tennessee*, 95 U. S. 679. As both may be taxed, both may be exempted from taxation by legislative authority; but one is not exempted by the exemption of the other.

This construction of the exempting clause is consistent not only with the language used, but is consonant with the general scheme of the act as evinced by its several provisions. The first section, which prescribes the method by which the basis of the assessment shall be furnished by officers of corporations, enjoins the duty upon the officers of corporations

liable to be taxed upon their "capital stock." In the third section of the act, prescribing the rate of the tax, the tax is assessed upon the capital stock of the corporation. There is nothing in the act to indicate that any other subject of taxation than capital stock of corporations was within the contemplation of the legislature. The exemption must not be construed to extend to a different subject and to a distinct species of property. The complainant must, therefore, fail upon this branch of its case. It relies, however, on the additional ground that the assessment in question is void because the assessors have failed to comply with the requirements of the local statute regulating their proceedings. Act of March 23, 1850. This act makes it the duty of the board of assessors of the city of Albany, between the third Tuesday of April and first day of September in every year, to ascertain the names of all the taxable inhabitants in the several wards of the city, and also of all the taxable real and personal property within the same, and to prepare an assessment roll for each ward. This roll is to contain four columns, in the first of which the names of the taxable inhabitants are to be set down, and opposite each name in the second column a brief description of his taxable real estate; in the third column the value of such real estate, and in the fourth column the value of his personal property after deducting just debts, etc. The act also makes it the duty of the board of assessors to complete this roll on or before the first day of September in each year, and then forthwith to cause notices to be published in three of the public newspapers of the city for 20 days, specifying a day at the expiration of the 20 days when the assessors are to meet and remain in session five days for the purpose of reviewing their assessments on the application of any person aggrieved.

It is made to appear that none of the shareholders of the complainant who were assessed for personal property on account of their shares of stock in the complainant were named in the roll prepared by the assessors, except one who was assessed for \$5,000 personal property, and another who was assessed upon real estate; but that a separate list was kept

by the assessors showing the names of all the stockholders of the complainant, (including the one assessed for \$5,000,) the number of shares held by each stockholder, and the assessable value of his shares. This list was prepared for the use of the assessors by the officers of the complainant. It further appears that after the five days had expired for the review of assessments the roll was copied into a book, and the names of the shareholders of the complainant were transcribed from this list and inserted in the first column, with the assessable value of their shares opposite, in the fourth column. During the five days some of the shareholders of the complainant treated the list as an assessment, and had their assessments reduced by deductions on account of debts, etc., and among them was one of the officers of the complainant. It is fair to infer, from the facts stated in the defendant's affidavits, that the board of assessors regarded the list thus kept by them as part of the assessment roll, although it was not physically annexed to the roll, and supposed it was a substantial compliance with the law, and would afford to the shareholders of the complainant notice of an assessment, and an opportunity for review and correction. It is also fair to infer from the facts exhibited, and in the absence of any allegations to the contrary on the part of the complainant, that the officers of the complainant and its several shareholders understood that this list was kept by the assessors, and regarded by them as part of the assessment roll, for the purposes of an assessment against the shareholders. It was not a literal nor a substantial compliance with the statute. Undoubtedly those requirements in statutes regulating assessment and taxation, which are designed to afford tax payers an opportunity for the examination and revision of their assessments, should not be deemed directory merely, but essential. The tax payer is not to be condemned without a hearing, and the precautions prescribed to give him an effectual opportunity to be heard should receive strict construction in his favor. These are matters which are of the substance of the procedure. A substantial compliance with such statutes, in all matters which are designed for the pro-

tection of the tax payer and the preservation of his rights, is a condition precedent to the legality and validity of the tax: *Westfall v. Preston*, 49 N. Y. 349; *Clark v. Norton*, Id. 243.

Where, as was the case here, the formal roll which is presented for the inspection of the tax payers contains no evidence of an assessment against an individual, he has a right to assume that there is no assessment against him. Neither legal duty nor common sense requires him to institute further inquiries. He has a right to assume that the assessors have complied with the law, and that their roll is the complete exhibit of their official action. He is not to suppose that a separate list unknown to the law has been regarded by the assessors as constructively a part of the roll, when in fact it is not a constituent part of it. Practically, as well as theoretically, to permit such a list to be regarded as the assessment roll would be dangerous, and liable to mislead the tax payers and deprive them of the opportunity to obtain a revision of their assessments.

It will not do to say that it should be sufficient as to a particular tax payer when brought to his knowledge. As matter of law, either the list is part of the roll or it is not. If it is not, it cannot be made so by extrinsic circumstances.

I am therefore constrained to hold that the assessment against the shareholders of the complainant was not merely invalid for irregularity, but void, because the assessors failed to observe a condition precedent to their right to assess. And this conclusion must result in granting the injunction asked for. In order, however, that there may be no misapprehension as to the views which lead to this result, it is proper to say that the right of the complainant to the relief stands on a very different footing from that of the several stockholders who have been assessed. If these stockholders were complainants there would be two sufficient reasons for denying them the aid of a court of equity and the preventive remedy of an injunction. Courts of equity are always reluctant to interfere with the collection of state taxes by the officers entrusted with that duty, and have almost uniformly

refused to do so when the case made rests solely on the illegality of the tax. As is ruled in *Dows v. City of Chicago*, 11 Wall. 108, "there must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury," etc., etc. Upon this consideration the stockholders would not be entitled to an injunction. But there is another ground upon which such relief would be refused them. In dealing with the rights of parties to resist taxation, courts of equity proceed upon considerations quite unknown to courts of law, and hold not only that it must appear the tax is one unlawfully imposed, but also one that justice and good conscience do not require the party to pay.

An illustration in point is found in *Mitchell v. Com'rs of Leavenworth*, 91 U. S. 206, where a complainant had converted his cash or deposit into United States notes before the day of listing taxes, in order to escape taxation, and being taxed, notwithstanding, the court held that although the tax was illegal, it would not, while sitting as a court of equity, use its extraordinary powers to assist him in a scheme to escape taxation, and dismissed the bill. In the present case I am unable to doubt that the stockholders understood that the assessors intended to assess their stock, and had made an informal assessment roll for that purpose. The statute required the complainant to deliver a list for the use of the assessors, and required the assessors to assess the shareholders in the ward where the bank was located; and it is not alleged in the bill or affidavits that a single stockholder was ignorant that he was assessed, or was in any way misled because the assessment was indicated upon a list and not upon the common roll. In short, it is not claimed that any shareholder was actually prejudiced by the failure of the assessors to conform to the strict requirements of the statute. Furthermore, it is stated in defendant's affidavits that the mode adopted by the assessors of keeping a separate list for the assessment of bank shareholders was publicly known,

and was the same which had been followed by the assessors for the city of Albany for many years, and was followed generally by assessors throughout the state.

Such being the facts, it must be assumed that the stockholders of the complainant preferred, instead of contesting the justice or equity of the assessment by seeking to have it reviewed and corrected, to rely upon their strict legal rights. I do not mean to impugn the personal good faith of the stockholders. Doubtless they believed that the law under which the assessment was made was in conflict with the act of congress, and that any assessment would be void for the reasons urged as the first ground for an injunction. But, as has been shown, that ground was not tenable, and if the stockholders were now seeking aid in equity because the assessors failed to give them the notice of the assessment required by law, they would be defeated upon the ground that as they were not in fact misled, and not unjustly assessed, they should be held to their strict legal rights, and not entitled to the intervention of a court of equity. They would, therefore, be relegated to their remedy at law.

But the rights of the complainant rest upon another footing. It is required, as has been stated, to withhold dividends from its shareholders to such extent as may be necessary to pay any taxes assessed against them. Some of its shareholders appeared before the board of assessors and were relieved from assessment. Many other shareholders did not attempt to be relieved, but now fall back upon their right to insist that the tax is illegal, and refuse to permit the complainant to retain their dividends. The complainant is thus exposed to a multiplicity of suits by these stockholders. If it pays over the dividends, the shares of many of its stockholders may be seized and exposed to sale. If the complainant transfers the stock to purchasers, it does so at the peril of maintaining the legality of the sale. On the other hand, if it refuses to pay the dividends to the shareholders, and resists their suits, the burden and expense of the litigation will fall upon those stockholders who have been relieved of their assessments as well as upon the others. The case, therefore,

is one where the court must intervene to prevent a multiplicity of suits. *Cummings v. Nat. Bank*, 101 U. S. 157; *Nat. Albany Ex. Bank v. Hills*, 5 FED. REP. 248.

The defendant insists that the complainant should resort to a *certiorari* for redress, under chapter 269 of the Laws of New York of 1880. If the assessment here were one against the bank, that act would afford a convenient remedy, and it might be urged that the complainant has an adequate remedy at law. But as the assessment is not against the bank, I cannot see how the act applies to the present case.

An injunction is granted.

TEXAS EXPRESS CO. v. TEXAS & PACIFIC RY. CO.

TEXAS EXPRESS CO. v. INTERNATIONAL & GREAT NORTHERN
R. CO.

(Circuit Court, N. D. Texas. March 22, 1881.)

1. RAILROADS—EXPRESS COMPANIES—DISCRIMINATION—CONTRACT.

A contract to furnish daily such an excessive and unnecessary amount of space, in the cars of a railroad company, for the transportation of the express matter of any one person or corporation, as will disable such railroad from serving others equally entitled to be served in the same manner, is illegal and void.

2. SAME—SAME—SAME—SAME.

Such a contract must be so framed as to adjust the rate of compensation to the number of persons and quantity (and perhaps quality) of matter transported, and to the length of the haul, and so as not to discriminate in favor of one or more companies or persons doing an express business against another or others engaged in a similar business.

3. REASONABLE MAXIMUM RATES — EXPRESS MATTER — TEX. REV. ST. ARTS. 4256, 4257.

Articles 4256 and 4257 of the Texas Revised Statutes, "establishing reasonable maximum rates of charges for the transportation of passengers and freight on railroads," provide, *inter alia*, as follows:

"Art. 4256. No railroad company shall demand or receive for transporting a passenger over its line of road exceeding five cents for each mile or fraction of a mile it may transport such passenger." * * *

"Art. 4257. Railroad companies may charge and receive not exceed-

ing the rate of 50 cents per hundred pounds per hundred miles for the transportation of freight over their roads, but the charges for transportation on each class or kind of freight shall be uniform, and no unjust discriminations in the rates or charges for the transportation of any freights shall be made against any person or place, on any railroad in this state: * * * *provided*, that when the distance from the place of shipment to the point of destination of any freight is 50 miles or less, a charge not exceeding 30 cents per hundred pounds may be made for the transportation thereof."

Held, that these statutory provisions were not intended to fix the reasonable maximum rates of charges for the transportation of the messengers and freight of express companies.—[Ed.]

In Equity.

F. E. Whitfield and White & Plowman, for the express company.

J. A. Baker and Welborn, Leake & Henry, for the railroads.

McCORMICK, D. J. The complainant in these bills, after setting out its corporate existence, citizenship, and powers, and the customary and well-known usages of its business, and the nature of the trade done by express companies and by the complainant company, and also setting out the corporate existence, citizenship, powers, and duties of the defendant corporations, shows in substance that the complainant has for a number of years past, and up to the presentation of its bill, been doing business on the lines of the defendants' railroads under contracts made and modified from time to time by the respective parties, and that recently both defendant corporations have given the complainant such notices (set out in the bill) as indicate a determination on the part of said defendants to terminate the contracts upon which complainant has been and is doing business on said lines; and plaintiff avers that in giving said notices said defendants had in view to lay a foundation for the ejection of complainant's express business from said railways, claiming and intending to assert the right in defendants to do the express business thereon themselves, or, excluding all other express companies, make an exclusive contract with one only.

Complainant shows the extent and irreparable injury that would result to it from such action as the defendants' conduct is averred to threaten, and prays in substance and with

ample detail that the defendants may be decreed to permit the continuance of complainant's business on the lines of defendants' roads without molestation or hinderance, and on such reasonable terms as do not exceed the rates prescribed by the laws of Texas, and do not exceed the rates upon which other express matter is transported by the defendants, and upon the same trains upon which other express matter is transported; praying, also, that the defendants, their agents, officers, and servants be perpetually enjoined from refusing the complainant the facilities now enjoyed by the complainant in the conduct of its business on defendants' roads, and from excluding any of its express matter or messengers from defendants' depots, trains, and cars, and from refusing to receive and transport, as the defendants are now doing, the express matter and messengers of the plaintiff, and from demanding from plaintiff, as a condition of shipment, the inspection of the contents of its packages, and from demanding from plaintiff a higher rate upon packed parcels, safes, and chests than upon other freights of like weight or bulk, or charging for the transportation of its express matter otherwise than upon the weight thereof, or from otherwise charging a proportionally higher rate upon small than upon large packages, or from discriminating against plaintiff, (in particulars exhaustively stated,) or in any manner disturbing the business of plaintiff in its relations to defendants, so long as plaintiff shall pay therefor a reasonable compensation, not exceeding the rates prescribed in articles 4256 and 4257 of the Revised Statutes of the state of Texas.

Plaintiff also prays for a discovery, from the officers of the roads named and made defendants in the bills, by which the terms and conditions of any contract with the Pacific Express Company, or with any other company or persons, if any such exist, by and between said defendants and said Pacific Express Company, or other person or company, for the transportation of express matter. Plaintiff also prays for a provisional or preliminary injunction, to remain in force pending this suit, etc.

On the first of March, 1881, I made an order in each case

directing the defendants, after service, to show cause before me at Dallas, on the sixteenth of March, why the provisional injunction asked should not issue; and that, in the meantime, the plaintiff should not be interrupted or discriminated against in its said business on the lines of said defendants' roads.

The issues being largely issues of law, and hardly affected appreciably by the slight differences in certain particulars of fact, both cases have been heard as one, neither of the defendants putting in an answer, as such, but submitting affidavits by the officers of the respective defendant railroads in the form of an answer, the officers of whom discovery was asked making full discovery as asked. The plaintiff has also submitted affidavits of C. T. Campbell, superintendent of plaintiff's business in Texas, in support of plaintiff's bill.

From the defendants' affidavits it appears that the defendants disclaim all right to eject the plaintiff from the lines of their respective roads, and deny entertaining any intention to discriminate against plaintiff. They exhibit fully contracts lately entered into by said roads respectively with the Pacific Express Company, and each of defendants' railroad companies testifies to its willingness to extend the same facilities and terms to the plaintiff, or any other express company, that their contract with the said Pacific Express Company engages them to extend to it.

From the contracts exhibited it appears that the International & Great Northern Railroad has engaged with the Pacific Express Company "to furnish said Pacific Express Company space in its baggage or express cars, to be hauled on passenger trains between Longview and San Antonio, for 4,500 pounds of through freight, each way, each day that a train is run; and between Palestine and Houston for 2,500 pounds of through freight, each way, each day that a train is run; and for one agent or messenger, who shall have charge of the express matter, and a safe for money and valuable packages,—for which the Pacific Express Company engages to pay \$150 for each and every day that a passenger train is run, and one-half first-class passenger fare for its

agents or messengers. The Pacific Express Company engages to pay for any excess of weight one and one-half of the local first-class freight rates between the points carried, as per the freight tariff of said railroad in use at the time; and, in case of any deficiency in the through freight on any day, the Pacific Express Company is allowed to add enough way freight, figured at one and one-half the local (railroad) freight rates, to make up the deficiency."

The Texas & Pacific Railway Company, in its contract with the Pacific Express Company, permits said Pacific Express Company to do a general express business over all the lines of said Texas & Pacific Railway Company's road, as now completed, or as may hereafter be built, owned, or controlled; and, besides other things not necessary to mention, agrees to furnish said Pacific Express Company sufficient space in its baggage or express cars, on all passenger trains, for the transportation of goods, merchandise, safes, and messengers of said Pacific Express Company; and the Pacific Express Company agrees to pay one-half first-class passenger fare for the transportation of the messengers and the messengers' safes, and the following rates for the transportation of merchandise, packages, and other express matter; namely, for distances under 15 miles, 30 cents per cwt.; graduating rates for the different distances up to over 450 and less than 500 miles, which last are charged at \$1.90 per cwt.; "it being understood and agreed that the payments for such transportation of merchandise, exclusive of messengers' fare, are to be not less than \$150 per day, without regard to the amount transported, for each and every day a passenger train is run for the lines as now completed,—the *fixed* amount to be paid as the lines of said railway companies are extended, to be agreed upon from time to time by the parties to this agreement."

It clearly appears from defendants' affidavits, as presented and discussed by defendants' counsel, that, by being willing and offering to furnish plaintiff and other express companies the same facilities on equal terms with the Pacific Express Company, said defendants' railroads embrace, in the terms they thus profess to offer, the payment, by any express com-

pany doing business on any portion of their respective lines, of the *fixed* daily sum of at least \$150 for each day a passenger train is run, and one-half first-class passenger fare for the whole length of their respective lines, each way, (or one full first-class passenger fare for the whole length of their respective lines,) each day a passenger train is run for said company's messenger, without regard to the amount of the express matter said express company may wish hauled, or the length of the line over which said express company may desire to carry on its business. The lines of each of defendants' roads, now open to business, measure, in the aggregate, respectively, about 600 miles. First-class passenger fare is limited in this state, and is now charged at the rate of five cents per mile. These contracts, therefore, when analyzed, mean the same thing, in the controlling point: that the Pacific Express Company shall pay each of the defendant railroad companies at least \$180 each day that a passenger train is run; and the equality of facilities and terms offered to all other persons or companies doing an express business is that you can use all or any portions of our lines for the transportation of your express matter, provided that you, and each of you, pay us \$180 a day, without regard to the weight, bulk, or quality of the matter we haul for you, or the length of the haul.

It is not at all difficult to comprehend that this is a species of equality that cannot fail to prove satisfactory to the minds of the management of these railroads, and that the degree of such satisfaction will be materially heightened by every addition to the number of persons or express companies doing an express business that accept and share these equal terms.

This contract with the Pacific Express Company by the Texas & Pacific Railroad Company appears to be the first fruits of "an avowed policy of his co-defendant (I quote the language of the vice-president of the company) for some months past, as soon as it could be done, to encourage competition in the carrying of express matter, so that the wants of the people could be met at cheaper rates than those which have heretofore prevailed."

That this species of equality would probably be so attractive to persons or companies doing an express business as to arouse their activity in competing for express business to be done on these lines, is not so apparent to my mind, and the ability, experience, and gravity of the very learned and skillful counsel appearing for the defendants were not equal to the presentation of that view of the case. It was, therefore, contended, as it has been contended in cases presented to other judges during the past year, (with which the courts and the legal profession have become somewhat familiar,) that the certainty of having dispatch was a necessary element of the express business; that this could only be secured by having always a sufficiency of room; that as each express company would want all the business if it could get it, and as one might succeed in getting it all, that to insure always having room, each had to contract for all the room its business on any one day might need, and hence had to contract for room equal to something more than the average daily haul of such matter, and that the express business, and not the railroad company, should bear the burden of the dead hauls necessary to secure at all times this ample supply of room. And further, as to these cases, it was urged that the plaintiff, by its bill, showed that it was in possession of the express business on these lines; that it had an established reputation; that it had the good will of such business on those routes, with trained messengers and other servants known to the public and trusted by the public along said routes, with all the appliances for doing all of said business as it had done for many years; and that, this being so, whatever other express companies might suffer by any supposed inequality in such terms, the plaintiff could not complain; that if the Pacific Express Company—a stranger, with no present run of business, and none of these elements conducive to procuring and transacting such business—could afford to make such a contract, surely the plaintiff could very much better afford it; that if there was any inequality it would manifestly work most strongly in favor of that express company which already was in possession of the trade.

It is not questioned that dispatch is one of the vital elements in the express business, and I do not question that for the convenience of both parties an express company may contract with a railroad company for such room daily, on passenger or other fast trains, as the railroad can furnish, without thereby excluding or discriminating against any other company or person doing an express business. This question of daily room for any one express company is, however, a subject of concern chiefly to the express company; the railroad company being only charged in its duty, as an exclusive carrier on a public highway, to study and ascertain the current volume of express business offering, and likely to offer, and provide adequate and reasonable accommodation for that business by whatever other agency or agencies, company, or person, one or more, such express business is done, and solicits transportation; and it is by no means clear to my mind that the furnishing of one company any reasonable amount of room for adequate compensation would disable or embarrass the railroad company, so as to prevent the railroad from providing adequate transportation for other parties equally entitled to have their matter transported; or, if such be the case, and it is conceded, as I believe it is in the arguments and affidavits in this case, that the defendants are bound to transport on equal terms for all persons or companies doing an express business, then I have no doubt that such a contract for daily room to any one person as disables the railroad from serving others equally entitled to be served, is as to all such other persons or companies illegal and void.

It appears from the affidavit of plaintiff's superintendent, C. T. Campbell, that the volume of the express business actually done over the lines of the International & Great Northern Railroad last year (a year, he says, of unexampled activity in this as in all other trade) did not exceed an average daily haul of 1,985 pounds, and with said roads, as extended, the business of the current year will not be more than 10 per cent. greater in weight of express matter to be transported on said lines than it was last year. To one not an expert in all the niceties of railroad management it would more readily

v.6,no.5—28

appear that, to contract with competing express companies that each should have each day room sufficient to carry nearly double the average daily haul, for all parties, over the road of express matter, if the contract on the part of the railroad was actually so carried out as to sequester from the use of all others the room engaged to each, might soon and seriously trench upon the other interests and duties of the railroad. Nor does the suggestion that the plaintiff is in possession of the express business, and therefore in no situation to complain, strike me with force in the direction intended. On the contrary, in my judgment the admitted facts in reference to the plaintiff's present relations to the express business, along the lines of defendants' roads, tend rather to challenge criticism of the proposition, that, by these contracts with the Pacific Express Company, these railroads are pursuing a policy to encourage competition in the carriage of express matter, so that the wants of the public can be met at cheaper rates than those which have heretofore prevailed.

Not denying or questioning the right of the railroad to contract with any express company for adequate room daily for such an amount of express matter as it actually has from day to day, so long as such contract does not disable such railroad from granting equal daily facilities to any other express company soliciting the same accommodations on the same terms, and so long as all of such contracts shall not disable such roads from furnishing adequate accommodations, in their due turn, to other companies or persons doing an express business and soliciting transportation for express matter, I am clearly of opinion that said railroad companies, when they do so contract, must so frame their contracts as to adjust the rate of compensation to the number of persons and quantity (and perhaps quality) of matter transported, and to the length of haul, and so as not to discriminate in favor of one or more companies or persons doing an express business against another or others engaged in a similar business.

As to the amount or rate of compensation, the plaintiff contends that such rates cannot exceed five cents per mile for the transportation of its messengers, and 50 cents per hun-

dred pounds per hundred miles for transportation of its express matter, and relies upon articles 4256 and 4257 of the Texas Revised Statutes to support this contention. This proposition of the plaintiff, considered in connection with the plaintiff's undisputed claim to have express matter hauled on passenger and other fast trains, and in the manner customary in hauling such matter, was denounced by the vice-president of the Texas & Pacific Railway Company, in his oral argument, as a proposition "too impudent" and "too bald" to be entertained by any court, or to permit the offering upon it of any argument to any court. His counsel, however, did argue this proposition elaborately, candidly, and with much force.

The provisions of the statutes upon which the plaintiff relies are the following:

Art. 4256. "No railroad company shall demand or receive for transporting a passenger over its line of road exceeding five cents for each mile or fraction of a mile it may transport such passenger. * * *

Art. 4257. "Railroad companies may charge and receive not exceeding the rate of 50 cents per hundred pounds per hundred miles for the transportation of freight over their roads, but the charges for transportation on each class or kind of freight shall be uniform, and no unjust discriminations in the rates or charges for the transportation of any freights shall be made against any person or place, on any railroad in this state: * * * *provided*, that when the distance from the place of shipment to the point of destination of any freights is 50 miles or less, a charge not exceeding 30 cents per hundred pounds may be made for the transportation thereof."

The correct construction of these provisions, and how far they effect the issue between these parties, is not free from difficulty. There is no literal exception in the statutes taking express matter out of its general terms used to embrace all commodities hauled by railroads. The only exception made in the statutes in direct and explicit terms is in reference to the mails of the United States, which are to be carried on such

trains as the proper authorities of the post-office department may require, and for such compensation as may be agreed on between the parties; or, in case they cannot agree, then at rates fixed by certain commissioners, at not less, when carried on passenger trains, than the rate for transporting an equal weight of matter on ordinary merchandise trains, with provisions for compensation for car, extra speed, etc. Article 4235.

The legislature had full and minute knowledge of the existence and extent and manner of conducting the express business of the country, and was mindful to impose on every person, firm, or association of persons doing an express business in this state an annual tax of \$750. Article 4665. The legislature, at least equally with the courts, had knowledge that express matter was carried in a particular manner on passenger and other fast trains, and not received, receipted for, or taken charge of by any of the servants of the railroad corporations. The legislature had knowledge also that this business, as to the compensation to the railroads therefor, had ever been and continued to be regulated by special contracts between the railroad companies and the express companies. Express matter is nowhere in any way specially mentioned in the statute. It is not provided that such matter shall be carried on other trains than ordinary merchandise trains.

It is, perhaps, true that the terms of the statute do necessarily include all matter received by the railroads and transported in the care of its servants, without regard to the quality of the matter or the train upon which it is carried. A railroad company could not, perhaps, receive a hundred pounds of fresh oysters in the shell at Galveston, and haul the same to Dallas, and (because its servants called it "express freight," and consented to haul it in a baggage car attached to a passenger train) charge more than 50 cents per hundred miles for the haul.

Upon a careful consideration of all the provisions of the Texas statutes bearing upon the subject, the inclination of my mind is to the opinion that it was not the intention of

the legislature, in the legislation already had upon the subject of "establishing reasonable maximum rates of charges for the transportation of passengers and freight on railroads," to provide such maximum rates for the character of carriage claimed by the plaintiff. I therefore hold that there is no Texas statute reaching and governing the subject of these rates. If it is practicable to define express matter with reasonable certainty, and to fix by law maximum rates for its carriage, it is most clearly not within the province of the judicial department of the government to do this. When and how far it may become necessary or expedient to do so must be left to the legislature to determine and declare; and until the legislature does so provide, the parties hereto, and all others similarly circumstanced, must be remitted to their right and power to contract in reference to the compensation for such service, subject to the limitations placed upon defendants by their duties as exclusive public carriers on public highways, that their terms for carrying shall be reasonable, and such as involve no unjust discrimination; to be determined in each particular case by the agreement of the parties in interest, and in case of their failing to agree, to be determined by the proper court on full statement and proof of the particular case.

In these cases a provisional injunction will be granted restraining the defendants as prayed in the bills, except as to the rate of compensation, and limiting that to such compensation as the parties may agree upon as being reasonable and not unjustly discriminating; or, in case of their failure to agree, requiring the parties to make such further application to the court as they may be advised is necessary, to enable the court to fix what is and shall be reasonable compensation in reference to the particular matters about which they are so unable to agree.

HOWE MACHINE CO. v. CLAYBOURN and others.

(Circuit Court, W. D. Michigan, S. D. February 16, 1881.)

1. FRAUDULENT CONVEYANCE—QUESTION OF FACT—MICHIGAN STATUTE.

The question whether a conveyance is made with intent to defraud creditors is, in the first instance, a question of fact, under the Michigan statute.

2. SAME—RESERVATION OF SECRET BENEFIT.

The reservation, therefore, of a secret benefit, upon the execution of an absolute conveyance, does not necessarily render such conveyance fraudulent as to creditors.

3. SAME—SAME.

The land, however, may be charged in equity with the benefit reserved.

4. SAME—BONA FIDE PURCHASER.

The fraudulent intent of the grantor cannot affect a *bona fide* purchaser without notice.—[ED.]

In Equity.

Albert H. Standish, for complainant.

Edwin Bacon, for defendant.

WITHEY, D. J. Defendant Thomas K. Claybourn became surety in a bond for one Abel to the plaintiff, in 1873, for \$3,000. In March, 1879, complainant obtained judgment on the bond against the makers, issued execution, and levied, May 8, 1879, upon 160 acres of land as Claybourn's. In December, 1877, this property was conveyed by Thomas K. to his son, Wilson A. Claybourn, by warranty deed, for the expressed consideration of \$4,000. On the same day the latter executed a bond to Thomas K. and Ann Claybourn, his wife, in the penalty of \$6,000, for their support during their lives. The condition recited that a conveyance of land had been made under an agreement by Wilson A. to support his father and mother. The wife of Thomas K. did not join in the conveyance. The lands constituted the farm of the grantor on which he resided. Graham is made a defendant as mortgagee, Wilson A. having executed to him a mortgage on the farm, March 1, 1878, to secure payment of \$1,600, money borrowed.

The bill in this case is filed in aid of the execution, and to have the deed to Wilson A. declared void as against the creditors of Thomas K. Claybourn. The proofs show that at the time of the conveyance the personal property on the farm belonging to Thomas K. was also conveyed; and that the transfers and bond for support were in pursuance of a verbal agreement between the father and son, by which the son, in addition to supporting his father and mother, was to pay certain of the father's debts, including \$1,817 of indebtedness to himself, which he was to and did surrender. Thomas K. was insolvent at the time of the conveyance to Wilson A., but the latter had no knowledge of that fact, and did not know of the liability of Thomas K. to complainant upon Abel's bond. If there had been no such indebtedness to complainant, Thomas K. had property more than sufficient to pay all of his liabilities.

The 40 acres on which Thomas K. Claybourn and his wife resided, worth \$1,500, was exempt as a homestead, and as the deed was not executed by the wife of Thomas K., it was void as to such homestead. The amount of Thomas K.'s debts which Wilson A. was to pay, including those owing to himself, amounted to about \$4,000, of which he paid about \$2,800 prior to any notice of the existence of complainant's claim, and since then he has paid nearly all the balance.

It is manifest that Thomas K. reserved a secret benefit to himself when he conveyed his property to his son.

The deed stated the consideration received to be \$4,000; but a further consideration not expressed was the support which the grantor and wife were to receive from the grantee,—a benefit reserved to the grantor, and not disclosed by the conveyance. The value of the real estate described in the deed of conveyance was \$6,400, and of the personal property \$160. There is, however, no testimony, save the transaction itself, tending to show that the son knew anything of any indebtedness against his father other than such as the son agreed to pay. Wilson A. Claybourn testifies that he knew

nothing of, and had not heard of, his father being surety for Abel in the bond to complainant. Complainant is entitled to reach the interest secretly reserved by Thomas K. out of the property transferred, but it does not follow that the conveyance is void in favor of creditors under the statutes of this state.

Section 4716, Compiled Laws of Michigan, declares that the question of fraudulent intent shall be deemed a question of fact and not of law. Section 4717 provides that the statute, declaring every conveyance made with intent to hinder, delay, or defraud creditors or other persons void, shall not be construed to impair the title of a purchaser for a valuable consideration, unless it shall appear that he had previous notice of the fraudulent intent of his grantor, etc. The statutes of fraud of Elizabeth have been generally construed in substantial harmony with the last provision, but quite differently from the import of the first-mentioned provision, which is not contained in the older statutes of fraud. The federal courts, under the statutes of Elizabeth, hold as a matter of legal presumption that a deed made by a debtor, which, on its face conveys absolutely, but out of which he reserves to himself some interest or benefit, is fraudulent and void; and, as the law makes the presumption, the court must determine, as a matter of legal construction, when the presumption is rebutted. *Hamilton v. Russell*, 1 Cranch, 309, 316.

Under the Michigan statute the question whether a conveyance is made with intent to defraud creditors is, in the first instance, a question of fact; and if a *prima facie* case, or one which raises a presumption of fraud, is made out, the question whether it is rebutted is also a question of fact. This case presents a question of the validity or invalidity of a deed of conveyance governed and controlled by the laws of the state. In a trial at law, the jury, and not the court, would have to deal with the question of fraud. Sitting in equity, the court performs the duties of court and jury. It cannot be held in this case, as in *Lukins v. Aird*, 6 Wall. 78,

relied upon by complainant's solicitor, that for a debtor to sell his land, convey it by deed without reservations, and yet secretly reserve to himself a benefit, is fraudulent as a conclusion of law, without reference to whether, as a matter of fact, the grantor and grantee intended to defraud creditors. It is the broad language of the court, applied to any such conveyance made by a debtor in failing circumstances, without qualification, which I do not accept or apply in this case. According to the language employed by Mr. Justice Davis it would make no difference that the grantee purchased without notice of his grantor's failing circumstances, or even that he was indebted. It has been held by that court that a conveyance will not be set aside without the element of bad faith in both the grantor and grantee. *Clements v. Moore*, 6 Wall. 312; *Astor v. Wells*, 4 Wheat. 466.

On the part of the grantor there can be no difficulty in finding his intention to have been fraudulent, either as a conclusion of law or fact in making the conveyance. But it is difficult from the whole proofs to fix upon the grantee any want of good faith, or an intent to hinder, delay, or defraud creditors. Provision was made to pay all debts of Thomas K. of which his son had any knowledge. The fact that the value of the property transferred, or supposed to be transferred, was \$2,400 in excess of the consideration stated in the deed, tends to throw suspicion on the good faith of the grantee, but, taken alone, or in connection with the other facts, it is not proof of fraud. So also the reservation by the grantor of benefits by the bond for support may be a badge of fraud; and conveying all the grantor's property is another fact that awakens suspicion; but none or all of them are necessarily evidence of fraud on the part of the grantee. If he takes title in the belief that the grantor is not indebted, or has by the transaction provided for the payment of all his debts, and has no good reason to believe otherwise, no ground is seen upon which to find fraudulent intent on the part of grantee.

The criterion by which to reach a conclusion is whether

the purpose of the grantee was to aid the grantor in perpetrating a fraud upon his creditors. Did he buy recklessly or with guilty knowledge, or, which is the same thing, with such knowledge as would put a prudent man upon inquiry? *Clements v. Moore, supra*. The actual secret intent of the grantor, however bad, cannot affect a *bona fide* purchaser without notice. *Astor v. Wells, supra*; *Hollister v. Loud*, 2 Mich. 313.

The grantor was not reputed to be insolvent. There is nothing in the proofs to show that he was put on inquiry, and all debts were understood to be arranged, and therefore there can be no presumption either of law or fact that on the grantee's part the purchase was with a fraudulent intent. I cannot, therefore, set aside the conveyance, but the land may be charged with the value of the benefit reserved by Thomas K. The statutory homestead, of the value of not more than \$1,500, did not pass to Wilson A., for the reason already stated. The title to the residue of the land did vest in him, subject to dower rights. But so much of the purchase price of the land as was reserved for the support of Thomas K. and his wife, and not paid or satisfied, can be reached by complainant in this suit. In his behalf, as a creditor at the time of the transfer of the property, equity will declare a lien upon the land, subject to Graham's prior mortgage lien. The case will be referred to a master to state and report what portion of the purchase price reserved for the benefit of Thomas K. and his wife remains unpaid, and on the coming in of the report complainant will be entitled to a final decree fixing the sum and declaring the lien, with authority to sell, etc.

UNION MUTUAL LIFE INSURANCE CO. v. THE UNIVERSITY OF
CHICAGO and others.

(Circuit Court, N. D. Illinois. March 23, 1881.)

1. FEDERAL AND STATE COURT—CONFLICTING JURISDICTION—SERVICE
OF PROCESS.

Where two suits, involving to a great extent the same subject-matter, are brought respectively in a state and federal court, that court whose process is first served obtains jurisdiction of all questions which legitimately flow out of the subject-matter of the case.

2. SAME—SAME—SAME.

A bill was filed in a state court to restrain the foreclosure of a mortgage, and have the same set aside and declared void. Subsequently, but on the same day, a bill was filed in a federal court for the foreclosure of the same mortgage, and charged that the defendant was conspiring with divers persons to defeat a recovery, by denying that the said defendant had any authority to execute such mortgage. The process of the federal court was served upon the following day, before 11 A. M., but the process of the state court was not served until after 2 P. M. of the same day. *Held*, that the federal court had a right to go on and decide all questions which legitimately flowed out of the subject-matter of controversy in the case, namely, those affecting the existence of the mortgage and the right of the mortgagor to make it, so as to reach a decree, if the case warranted it, which should be conclusive upon the mortgagor; that is to say, which should prevent the mortgagor from ever setting up any claim or right to the property, or any claim whatever that it had not the right to execute the mortgage.—[Ed.]

Leonard Swett, E. R. Bliss, and J. L. High, for complainant.

Charles A. Gregory, for the University of Chicago.

Decker, Douglas & Kistler, for the Douglas heirs.

DRUMMOND, C. J. In 1856, Stephen A. Douglas was the owner of a tract of land in the south part of the city, which he proposed to convey to certain parties or to a corporation for an institution of learning. A contract was made between him and Dr. Burroughs, who represented the institution, on the second day of April, 1856. This conveyance was to be made on certain conditions which were expressed in the contract, among which were that there should be a building erected on the property, and that a certain amount of money

should be contributed. On November 10, 1856, it appears that Dr. Burroughs ascertained that he was not able to comply with the conditions of the grant, and accordingly application was made to Mr. Douglas for the purpose of obtaining an extension of the time, during which certain things were to be done,—for instance, the laying of the foundation of the university,—and accordingly Mr. Douglas then made a memorandum by which he extended the time for laying the foundation of the university until the first day of May, and for expending the first sum of \$25,000 until the first day of October, 1857. All the other conditions annexed to the grant were to remain in full force. This clause terminated the memorandum of agreement which was at that time made: "This extension of time is granted on the condition and with the understanding that the title of said land shall forever remain in said university, for the purposes expressed in said agreement, and that no part of the same shall be ever sold or alienated, or used for any other purpose whatever." Dr. Burroughs transferred all interest that he had in this contract, and in this memorandum, to the trustees of the University of Chicago; and on the thirtieth day of January, 1857, the legislature of this state passed an act incorporating the university, and on August 13, 1858, Mr. Douglas conveyed the land, which was the subject of the contract between him and Dr. Burroughs, to the board of trustees of the University of Chicago absolutely. There was no condition or qualification named in the deed such as is contained in the articles of agreement made between him and Dr. Burroughs. The Chicago University took possession of the property, a building has been constructed upon it, and the institution has been carried on with more or less success ever since.

February 8, 1876, the university executed a mortgage or deed of trust to the plaintiff in this case, the Union Mutual Life Insurance Company, to secure the sum of \$150,000. These are all the facts necessary to refer to before mentioning what has taken place in the courts.

On the eighteenth of February last a bill was filed in the circuit court of Cook county by Mr. Mills, the state's attorney

of the county, who appears on behalf of the state; by Carter H. Harrison, mayor of the city, and *ex officio* one of the regents of the university, and by Isaac N. Arnold, also a regent of the university, for the purpose of declaring that the mortgage or deed of trust which was executed by the board of trustees to the plaintiff in this case was inoperative, on the ground, I infer, of the clause contained in the memorandum of Mr. Douglas of November 10, 1856, which has already been referred to. The prayer of the bill is that Levi D. Boone, the trustee in the deed which was executed by the board of trustees for the benefit of the plaintiff in this case, the University of Chicago, and John C. Burroughs, and the board of regents, who are made parties defendant, may be required to make full and direct answer to the same, etc. The bill asks that Boone and the Mutual Life Insurance Company may be perpetually restrained from attempting to foreclose the mortgage, and that the said trust deed or mortgage may be set aside and declared void as against the said University of Chicago, as a cloud on its title, and that the said deed may be delivered up to be cancelled.

On the same day, the eighteenth day of February last, the Union Mutual Life Insurance Company filed a bill in this court to foreclose the mortgage or deed of trust, claiming that default had occurred in the payment of the interest, and that the principal and interest were due, and that they had a right to foreclose the mortgage; claiming also that the university had failed in performing many of its contracts about keeping the property insured, etc. That bill contains this clause: "And your orator further charges that the said defendant, the University of Chicago, through its officers and agents, has conspired, or is conspiring, with divers persons to your orator unknown, to defeat your orator's recovery of its said claim as hereinbefore stated, by denying that it, the said defendant, the University of Chicago, had authority to execute said trust deed, and to convey said premises, as in the manner herein set forth."

The defendants to this bill are the University of Chicago, a corporation created under the laws of this state; N. K. Fair-

banks, president, and O. W. Barrett, secretary, of the board of trustees; Levi D. Boone and Samuel S. Boone, the one as trustee of the mortgage or deed of trust, and the other as the successor of the trustee. As I have said, the bills were filed on the same day, the one in the circuit court of Cook county, and the other in this court. It seems that the bill in the state court was filed before the bill in this court, although on the same day. No process of either court was served on the day the bill was filed. On the nineteenth of February, the day following, the process of this court was served on all the defendants, before 11 o'clock A. M. of that day. The process issuing from the state court was not served until after 2 o'clock P. M. of the same day; so that the process issuing from this court was first served; and the question is whether this court obtained jurisdiction of the case for the purposes contemplated by the bill, viz.: for the foreclosure of the mortgage. Although the bill was filed in the state court first, on the same day, the rule, I take it, is well settled that the right of a court to take jurisdiction of a party depends upon the service of process upon the party. If a party commence a suit, and process is not served, it does not take effect as against the party defendant, howsoever long process may remain in the hands of the officer. The process of this court being first served upon the defendants, the University of Chicago, and upon Boone, gave this court jurisdiction and the right to go on and foreclose this mortgage. It is said, and there is some evidence in an affidavit tending to establish the fact, that there was a race on the part of the plaintiff, in the case in this court, first to obtain service upon the defendants. It may be, but at the same time this court must look at the facts. It is often a question which has been most diligent, and courts have to determine rights according to the diligence of a party. And if, in this case, the plaintiff has been more diligent than the plaintiff in the state court, how can this court deprive it of its equity, and the preference to which it may be entitled? I do not know of any way that this can be done. Then this court retains this bill for the purpose named in it—for the foreclosure of this deed of trust or mortgage—and the

question is, what is the effect of that? After these two bills were filed the plaintiff in this court came into court, and, on the twelfth instant, filed a supplemental bill alleging the facts of the litigation in the state court: that a bill was there filed for the purpose named, and giving a copy of the bill; also alleging that Stephen A. and Robert M. Douglas, heirs at law of Mr. Douglas, the donor of this land to the university, had interposed in the state court and become defendants, and filed a cross-bill for the protection of any equities they may have, on the ground, as I understand, that in consequence of the failure on the part of the Chicago University to perform an alleged trust, the property has reverted to the heirs of the donor.

It is undoubtedly a very embarrassing state of litigation, there being two suits brought in two jurisdictions, involving to a great extent the same subject-matter, and I have felt some difficulty in determining what is the true rule upon this subject, but I have come to the conclusion that it must be this: That this court has a right to go on, as I have already said, and decide all questions which legitimately flow out of the subject-matter of controversy in this case, namely, those affecting the existence of the mortgage and the right of the University of Chicago to make it, so as to reach a decree, if the case warrants it, which shall be conclusive upon the University of Chicago; that is to say, which shall prevent that corporation from ever setting up any claim or right to this property, or any claim whatever that it had not the right to execute this mortgage. That is as far as I think it is necessary, and to that extent I think it is the duty of the court, to go. In this case is involved the fact of the making of the mortgage, the right of the University of Chicago to execute it, and the right of the court to make a decree which shall foreclose all the equities of the University of Chicago. In one sense it is true that a proceeding by foreclosure does not necessarily involve the absolute or indefeasible title to the land. The object is to foreclose whatever equity the mortgagor may have in the land. It may happen that there is a paramount title in a third party which need not be de-

cided upon the bill of foreclosure, but the question does arise as to the right of the mortgagor to execute the mortgage, and whether or not he should be foreclosed and forever barred from setting up any claim to the land covered by the mortgage.

Now, I think I may say to the counsel that there ought not to be two litigations upon the questions to which the court has adverted; that is to say, in two different courts. I admit that it is quite possible that the court may go on in this case and make a decree forever barring the equities of the University of Chicago, and preventing it from ever setting up any claim to this land, and placing this plaintiff, so far as the University of Chicago is concerned, in possession; but still there may be a right outside of that, existing in a third party, which would not be interfered with by this decree. I do not desire, if it can be avoided, to issue an injunction in this case, even if I have the right to do so. I have stated these views upon the questions of law involved, and I leave it to the counsel to determine whether it shall become necessary for the court to take any positive action.

I think it may be the right and duty of the court, if it shall become necessary, to prevent any parties in the state court litigation, who are also parties here, from going on and raising the question whether or not the University of Chicago had the right to execute this mortgage, and whether it is to be estopped by the decree of this court; for these are questions, I think, this court has the exclusive right to determine,—the court having jurisdiction of the parties and of the subject-matter,—and I think the decision of the court would be, as to the University of Chicago, binding in all courts. I leave the matter, therefore, without any order being made at this time, for the consideration of counsel.

GAINES v. HAMMOND'S ADM'R.

(Circuit Court, E. D. Missouri. February 5, 1881.)

1. STATUTE OF LIMITATIONS—LETTERS OF ADMINISTRATION—MISSOURI.

The bar of the statute of limitations (Missouri) is not removed by the issuance of letters of administration upon the estate of the deceased debtor.

2. SAME—SAME—SAME.

This rule is not modified by the fact that it was not known that the decedent had any estate calling for administration until after the expiration of the statutory period of limitation.

3. SAME—LITIGATION WITH THIRD PARTIES.

Such statute does not cease to run merely because the creditor is involved in litigation with third parties, upon which her individual right to the debt is dependent.

4. SAME—SUCCESSIVE COVERTURES.

Such creditor cannot tack her subsequent disabilities by successive covertures in order to prevent the operation of the statute of limitations.

5. UNIVERSAL LEGATEE UNDER VALID WILL—EXECUTORS UNDER VOID WILL—JUDGMENT.

Quere, whether a universal legatee under a valid will has any interest in a judgment obtained by the executors of a prior void will.

6. DECEDENT'S ESTATE—ADMINISTRATION—GRANT TO REPRESENTATIVES.

Quere, whether a grant by the United States to the representatives of a decedent of a tract of land claimed by the decedent, and taken in execution for his debts, but to which he had in fact no legal title during his life-time, could be treated as the individual estate of such decedent, and subjected to administration.

7. STATUTE OF LIMITATIONS—VOID SALE—PURCHASERS.

Quere, whether, under the circumstances of this case, after the expiration of more than half a century, lands could be recovered from purchasers under a void sale.

8. PRIOR KNOWLEDGE OF THE FACTS—BILL FILED IN 1848.

Held, that it appeared from a bill filed in the court in 1848 that the plaintiff was fully informed of all the facts which it is now averred she did not discover until a date long subsequent.—[Ed.]

In Equity.

This is a demurrer to a bill in equity. The bill alleges as a ground for equitable relief, in substance, the following facts: Complainant is the daughter of Daniel Clark, and the devisee of all his property by his will executed in 1813. She

v.6,no.5—29

was born in 1806, but was brought up in the family of one Davis, with whom she resided in New Orleans until 1812, when she went with them to Philadelphia. She was married in Philadelphia to one Whitney, in 1832. Whitney died in 1838. In 1845 she married General Gaines, who died in 1858. She only discovered her true parentage in 1834. Of the will under which she took she was also ignorant until then, and for more than 30 years thereafter she was engaged in lawsuits, by which she finally was able to prove the authenticity of the will of 1813, finally established. Clark died in 1813. A will executed in 1811 was probated as his last will, and Relf and Chew, as executors, acted under it for many years. Among other things, Relf and Chew appointed defendant's intestate, Hammond, to sell certain lands in Missouri. Hammond did so, but converted a part of the money derived from the sales to his own use in and before April, 1819. Suit was brought to recover the sum due in April, 1819, and judgment was rendered for Relf and Chew in August of that year for \$6,841.80, which was affirmed on appeal in 1823, and certain property was sold on execution as land belonging to Hammond in October, 1823. This land was bid in by Relf and Chew, and was sold by them to various persons, who held possession of it for many years. No title passed, however, to Relf and Chew at the sale on execution, because the interest which Hammond had in the land was simply a New-Madrid claim, and no return was made as required by the act of 1822. There were other reasons also why no title passed. Hammond, it is alleged, absconded from Missouri in December, 1824. He died in Maryland in 1842. No letters of administration were granted on his estate until 1879. The title to the land above mentioned remained in the United States until June, 1864, when it was granted by the government to Joseph Hunot or his legal representatives, or, in other words, to the representatives of Hammond. This fact was not known to complainant until 1879, when the supreme court of Missouri held that Hammond's representatives were entitled to the property, and that the representatives of Relf and Chew obtained no title thereto whatever under the ex-

cution sale in 1823. Hammond had no other property. The bill alleged that Relf and Chew were executors in their own wrong; that complainant only had a right to the money converted to Hammond; that the judgment against him is evidence of the fact of his receiving and converting the money, and that, under the facts, she is entitled to judgment for the money converted, with interest, for which she prays. The bill sought to state ground of excuse for a failure to bring suit before, alleging the absconding of Hammond from Missouri; that no letters had been taken out on his estate before 1879; complainant's difficulty in establishing her rights under Clark's last will; the fact that Hammond's estate never was seized of the property until 1879; and her ignorance that Hammond had any title whatever to the land until that year. The demurrer was both general and specific, and raised the question whether the claim was not barred by the statute of limitations of Missouri territory and state, allowing only *five years* for the bringing of an action like the present one.

Britton A. Hill and N. Oscar Gray, for plaintiff.

Cline, Jamison & Day and D. T. Jewett, for defendant.

TREAT, D. J. I commenced to write an elaborate opinion, but found it expanding to such an extent, that, for want of time, I abandoned the purpose. The case, as presented, involves many serious questions, if considered *seriatim*, but there is one controlling view which disposes of the whole matter.

The plaintiff was *sui juris* more than 50 years ago, and if she succeeded (which is doubtful) to the rights of Relf and Chew under the judgment of 1819 in their favor, no adequate reason has been assigned in law or equity for her failure to pursue her rights thereunder prior to 1879 or 1880. If she cannot have the benefit of said judgment in her own right, she is in a still worse condition. Relf and Chew, under the will of 1811, have been found, judicially, to have acted without authority; for said will, after protracted litigation, was held to have been superseded by the will of 1813. Hence, what Relf and Chew did, and what their agent, Hammond, did, was void, or voidable, as against said persons; and she

has slept on her rights, if she had any, for more than 50 years.

But it is contended that as Hammond absconded from Missouri in 1824, and died in 1842, and it was supposed his interest in the Hunot tract had been disposed of under the sheriff's sale in 1823, it was not known that he had any estate calling for administration till 1879.

Hammond had what is termed a New Madrid claim, upon which levy had been made under the judgment of 1819. That claim came to naught for failure to make the return required by the act of 1822. For that and other reasons stated by the supreme court of Missouri, nothing passed to the purchasers at the sheriff's sale under the judgment of 1819.

If Hammond owed anything to the Clark estate, she had a right to pursue her demand as soon as she attained her majority, and cannot tack her subsequent disabilities by successive covertures to prevent the operation of the statute of limitations. Hence, if she claims that said judgment enures to her benefit there are two complete defences thereto: *First*, the statute of limitations; *second*, the presumption of payment after the lapse of 50 years. If her demand is on an open account against Hammond, and she is willing to waive his unauthorized action and treat him as her agent, that demand accrued as early as 1819, and he has been dead, so far as she is concerned, for nearly 38 years before this suit was brought.

It is claimed that, inasmuch as no administration was taken on Hammond's estate until 1879, the plaintiff has the statutory period after letters of administration to establish her demand, however stale. I do not so read the Missouri decisions cited, and if they asserted any such doctrine there would be an end indefinitely to statutes of repose in case of death and failure to administer. The administration statutes require claimants to present their demand within the times stated, or stand barred. They do not revive claims previously barred by the statutes of limitation. I so understand the supreme court of Missouri to hold—a ruling in conformity with well-recognized doctrines on that subject.

It seems that Hammond, under the rulings of the United States supreme court, had no such interest in the Hunot tract that, during his life-time, he could have maintained ejectment therefor, or that could possibly have been reached by execution. By the special act of congress in 1864, there was confirmed to him and his legal representatives the Hunot tract; that is, about 22 years after his death. Whatever may have been subsisting demands against him prior to his death, subject to be enforced through administration on his estate, it might be a grave question whether the grant of 1864 could be treated as his individual estate, subject to administration. At the time of his death neither he nor the purchasers at the sheriff's sale in 1823 had any legal interest in the Hunot tract. All interest he might have had in the same was barred in 1823 through his failure to comply with the act of 1822.

Thus matters stood until congress, 22 years after his death, confirmed to his legal representatives the tract spoken of. It has been held that, even taking the broadest view of the doctrines laid down in *Landes v. Brant*, *Relf and Chew* took nothing under the sheriff's deed of 1823, much less this plaintiff. It seems that other parties in interest, through protracted litigation, ascertained in 1879 that the only legal representatives of Hammond under the act of 1864 were his heirs. So soon as that fact was thus judicially ascertained, the plaintiff caused administration to be had on Hammond's estate, about 37 years after his death, in order to prove up, it may be, a judgment to which she was not a party, rendered about 60 years before, or on an open account, which, by waiving the original wrong, she might have had established in 1819, or at least so soon as she became *sui juris*, more than 50 years ago. The bill, however, recites what has almost become judicial history through the various decisions of many courts, and notably three by the United States supreme court, to-wit: the long and painful struggle of the plaintiff to have her father's will of 1813 established, and her rights recognized thereunder, which struggle culminated in her favor before the act of 1864 referred to. *Gaines v. Hennen*, 24 How. 553.

Who was responsible for this long delay? Hammond's position was, however, readily ascertainable from 1819. The plaintiff might, if she had any rights against him, have pursued them before 1830, and prior to Hammond's death. Because she was involved in a legal controversy with others, did the statute as to Hammond cease to run, whereby, after the lapse of more than a half century, she can pursue the Hammond estate? If so, then every person not a party to a suit must be held bound by its outcome, despite the statute of limitation; and thus the statutes of limitation become futile.

Reference has been made to certain decrees and judgments entered in favor of plaintiff by the United States circuit court in Louisiana. The facts and circumstances under which those decisions were had are unknown to this court. The cases seem to have been for the recovery of the possession of realty devised to her under the will of 1813, despite the sale made by Relf, Chew, and Mary Clark under the will of 1811. So, here, the property belonging to Daniel Clark's estate, sold by Hammond prior to 1819, (he acting as agent for Relf, Chew, and Mary Clark,) may in law belong to this plaintiff, unless her rights thereto are barred; but she is not seeking to recover said realty, but the amount paid to Hammond for said void transfers. It may be that the statute of limitations would bar any suit against the purchasers from Hammond; but, whether such be the fact or not, it is not seen how she can recover from Hammond's heirs the money judgment claimed by her, and have the same made a charge upon the lands which came to his heirs under the act of 1864. Again, her excuse for not proceeding in this matter at an earlier date, even if the same were valid, is met by the fact that in 1848 she filed a bill in this court wherein it appears that she was fully informed of all the facts that it is now averred she did not discover until a date long subsequent. In no possible view of the case, as presented by the bill, has she any right to maintain the same.

The demurrer is sustained and the bill dismissed.

SMITH and others v. SCHWED and others.

(Circuit Court, W. D. Missouri, W. D. ———, 1881.)

1. FEDERAL PRACTICE—REMOVAL—BILL FILED IN STATE COURT—VERIFICATION—INJUNCTION.

Upon the removal of a cause from a state court, an injunction will not be dissolved upon the ground that the bill filed in such court was not verified according to law and the practice of courts of chancery.

2. EQUITY PLEADING—FRAUDULENT JUDGMENT—INJUNCTION.

A bill to enjoin the execution of a fraudulent judgment need not aver that the plaintiff in such judgment is insolvent.

3. FEDERAL PRACTICE—REMOVAL—INJUNCTION.

Upon the removal of a cause, the federal court can maintain an injunction obtained in the state court.—[Ed.]

In Equity. Motion to dissolve injunction.

It is provided by statute in Missouri that "any attaching creditor may maintain an action for the purpose of setting aside any fraudulent conveyance, assignment, charge, lien, or encumbrance of or upon any property attached in any action instituted by him." The cause was removed by the complainants.

Bryant & Holmes and *Tichenor & Warner*, for motion.

Botsford & Williams and *Scarritt & Riggins*, *contra*.

MCCRARY, C. J. The complainants, who are creditors of the firm of Schwed & Newhouse, merchants in Kansas City, Missouri, filed their bill in the circuit court of Jackson county, Missouri, praying that a certain judgment confessed by said Schwed & Newhouse in that court in favor of one H. Heller, of Philadelphia, Pennsylvania, for \$9,572, rendered on the twenty-sixth day of January, 1880, be cancelled and set aside.

The bill charges that the said judgment was fraudulent, and was confessed for the purpose and with intent to defraud, hinder, and delay the *bona fide* creditors of Schwed & Newhouse, who were not indebted to said Heller in said sum of \$9,500, or any other sum, at the time of the fraudulent confession, but that said judgment was confessed without any consideration, and for the purpose aforesaid.

It is further alleged that execution has been issued upon

said judgment and levied upon the only property of said Schwed & Newhouse within the state of Missouri, to-wit, a stock of watches and jewelry, and that attachments in favor of plaintiffs have been levied upon the same property. After the filing of the bill in the state court, and after all the defendants had appeared, a motion for a temporary injunction to restrain the execution of said judgment was heard by that court, and an injunction allowed to remain in force until a final hearing of the cause. Afterwards the cause was removed to this court. The defendants here move to dissolve the injunction granted by the state court upon grounds which will now be considered.

1. It is said that the bill is not verified according to law and the practice of courts of chancery. It is to be presumed that all questions relating to the form and sufficiency of the bill, and of the verification thereof, were considered and decided by the state court upon the hearing before that tribunal of the motion for an injunction, and that the affidavit was held to be good and sufficient under the state law. Whether that ruling was correct or not I will not inquire, because this court is not called upon to review the orders and ruling made by the state court in the progress of the cause before the removal. In the case of *Dungan v. Gegan*, 101 U. S. 810, the supreme court, by *Waite*, C. J., laid down the rule upon this subject as follows: "The transfer of the suit from the state court to the circuit court did not vacate what had been done in the state court previous to the removal. The circuit court, when a transfer is effected, takes the case in the condition it was when the state court was deprived of its jurisdiction. The circuit court has no more power over what was done before the removal than the state court would have had if the suit had remained there. It takes the case up where the state court left it off." In view of this authority, I am disposed to consider the question of the sufficiency of the verification of the bill as disposed of by the action of the state court. No doubt this court may, upon proper showing, in a case removed, vacate or modify an injunction allowed in the case by the state court, and before removal; but such

an order should not be made as the result of the reconsideration of any question of pleadings or practice decided by the state court before it was deprived of jurisdiction.*

2. It is insisted that the injunction should be dissolved because there is no allegation that Heller, the plaintiff in the confessed judgment, is insolvent. It is said that, if he be solvent, the complainants herein have an adequate remedy at law in case he enforces his judgment, and thereby deprives them of the means of collecting their claims against Schwed & Newhouse. The complainants have a lien by attachment upon certain property, and they aver that, by means of a fraudulent judgment, the defendant Heller and Schwed & Newhouse have conspired together to take said property, thereby depriving complainants of the means of enforcing their liens. If these allegations be true, the complainants are entitled to the relief sought without alleging the insolvency of Heller. They have the right to hold their liens upon the property of their debtor, and to enforce the same as against any fraudulent claims or liens attempted to be set up by third parties, whether such third parties are solvent or insolvent. They are not bound to submit to the enforcement of a fraudulent and void judgment against said property, and the defeat thereby of their attachment liens upon it, even though such judgment may be held by a person who is able to respond in damages. The holder of a fraudulent and void judgment cannot be permitted to enforce it on the ground that he may be afterwards sued at law, and a judgment for damages recovered and enforced against him. If the judgment was obtained by collusion, and for the purpose of defrauding complainants, an injunction to restrain its execution is the proper remedy, (*High on Injunction*, § 118; *Green v. Haskell*, 5 R. I. 449; *Oakley v. Young*, 2 Halst. Ch. 453;) and I am of the opinion that in such a case the bill need not aver the insolvency of the plaintiff on the fraudulent judgment. To allow the execution of such a judgment as against innocent third parties, remitting them to their action for damages afterwards, would not be to afford them a plain, speedy,

*See *City of Portland v. Oregonian Ry. Co.*, ante, 321.

and adequate remedy. The jurisdiction in equity arises in all such cases upon a proper allegation of fraud. If it were necessary to aver and prove insolvency as well as fraud, the jurisdiction would be defeated in very many cases.

3. It is insisted that this court cannot maintain the injunction because it stays proceedings in a state court. Section 720 of the Revised Statutes of the United States provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." The ready answer to this proposition is that the court is not asked to grant an injunction to stay proceedings upon the judgment in the state court, but only to continue in force an injunction allowed by the state court before the removal of the cause. Jurisdiction for this purpose is plainly given by the fourth section of the act of congress of March 3, 1875, which provides "that when any suit shall be removed from a state court to a circuit court of the United States, * * * all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be so removed." If the removal act did not contain this provision, I think it would be implied from necessity. In all cases where a removal is authorized, the federal court must be empowered by necessary implication, if not by the express words of the statute, to take the case and carry it on to final judgment and execution. If this were not so, the effect of a removal might be to deprive a party of his remedy in the state court, and to give him none in the federal court.

The motion to dissolve the injunction is overruled.

NOTE. See *Diggs v. Walcott*, 4 Cranch, 179.

DILWORTH v. JOHNSON and another, Exr's, etc.,

(*District Court, D. New Jersey. April 5, 1881.*)

1. STATE COURT—PAROL TESTIMONY—CONTRADICTION OF RECORD.

Where a former adjudication of the matter in controversy in a state court is pleaded in a suit in the federal court, the plaintiff will not be permitted to contradict the record of the state court by parol testimony.—[Ed.]

In Equity.

NIXON, D. J. The bill is filed in this case by Urania J. Dilworth, a resident of the state of Pennsylvania, against George S. Johnson and Gardner B. Johnson, executors of the last will and testament of William Johnson, deceased, for the construction of said will. The two executors have severed in their pleadings to the bill of complaint, one of them filing a plea and the other an answer, but both setting up as a defence a former adjudication of the matters in controversy by the court of chancery and the court of errors and appeals of the state of New Jersey, in a suit in which the complainant and the defendants were parties.

The testimony taken sustains the issue thus raised. It appears that in the year 1872 one Harriet Poulston, who was a sister of the complainant and one of the beneficiaries under the will of the said Johnson, filed her bill, with her husband, in the court of chancery of New Jersey, against the said executors, and praying, practically, for the same relief as is asked for in the present case. The complainant was then, as now, residing in Pennsylvania and beyond the jurisdiction of the state court, and hence was entitled to her option to become or not to become a party to the proceedings. She made her election, appeared by counsel, became one of the party defendants in the cause, participated in the proceedings, and obtained a decree from the chancellor substantially in accordance with her view of the intentions of the testator. One of the executors carried the case to the court of errors and appeals, where the complainant again appeared by counsel,

put in her answer to the petition of appeal, and was fully heard by the court in her efforts to sustain the decision of the chancellor.

These facts abundantly appear from the records of the proceedings in the state court, which the defendant George S. Johnson has annexed to his plea.

It is true the complainant denies that she appeared to the action, or ever authorized any one to appear for her. But there are two answers to this: (1) She is not allowed to contradict the record by parol testimony in the pending suit. It is conclusive as to every material fact stated in it. Such contradiction was attempted in this district in the case of *Field v. Gibbs*, 1 Pet. 156, where, to a declaration on a judgment, the defendant pleaded that no process was served upon him to answer the plaintiff in the suit on which the original judgment was founded; that he never appeared to the action, nor did he ever consent to any of the proceedings, or authorize any person to consent for him. The plea was demurred to, and on examining the record of the judgment it appeared that the defendants Martin and Joel Gibbs had been attached to answer the plaintiff; that both the defendants appeared by John P. Ripley, their attorney, and pleaded several pleas. The record further stated that, in every succeeding stage of the cause until the judgment was rendered, both defendants appeared by the same attorney. Judge Washington said that it was not competent for the defendants to plead in bar that they had not been served with process, and did not appear by attorney, for such plea contradicted the record, which was contrary to the universal rule of law, to-wit, that nothing could be assigned for error, nor could any averment be admitted, that contradicted a record. (2) But, without demurring to the plea, the parties went to their proofs, and the weight of the testimony is against the complainant on the issue of fact. Mr. Wilson, the counsel who was employed by her, gives a full and circumstantial account of the circumstances under which he was retained to represent her and her adult children in the action, and his evidence leaves no room

for doubt that the complainant has forgotten the real facts of the transaction.

The plea and the answer are a bar to the suit in law and in fact, and the complainant's bill must be dismissed, with costs.

MATTHEWS v. WARNER and others.

(Circuit Court, D. Massachusetts. March 1, 1881.)

1. MORTGAGOR—SEPARATION OF NOTES FROM MORTGAGE—EQUITABLE RELIEF.

A mortgagor is not entitled to relief in equity upon the ground that the mortgage has been separated from the outstanding and unpaid notes which it was given to secure.

2. USURY—EQUITABLE RELIEF.

One who seeks relief in equity upon the ground of usury must first offer to repay the money actually lent.

3. SAME—SAME—FOREIGN STATUTE.

A statute of New York, which authorizes a borrower to obtain a cancellation of securities without payment, upon the ground of usury, cannot bind a court of equity, out of the state, in dealing with a bond and mortgage made and delivered within the state.

4. HUSBAND AND WIFE—BONDS IN NAME OF WIFE—INTEREST OF HUSBAND.

5. FRAUD—MORTGAGE—ASSIGNEE WITHOUT NOTICE.—[ED.]

In Equity.

W. A. Abbott and J. S. Abbott, for complainant.

E. R. Hoar and J. B. Warner, for defendants.

LOWELL, C. J. This bill, filed in December, 1877, alleges that the plaintiff, Virginia B. Matthews, of New York, was, on the first of January, 1877, and for a long time before and after, the owner of 150 bonds of the Memphis & Little Rock Railroad, and of 50 bonds of the Carolina Central Railroad, of \$1,000 each, giving the numbers; that they were her separate property; that some person to her unknown, and without her consent, authority, or knowledge, placed these bonds in the hands of Warner & Smith, of Boston, the defendants; that Warner & Smith, as the plaintiff is informed and be-

lieves, claim to hold the bonds as lawfully pledged to them to secure some debt or demand to her unknown, and intend to sell them at auction; that the defendants sometimes claim that the bonds were pledged to them by the plaintiff's husband, Edward Matthews; but, if so, he had no authority so to pledge them, and that the defendants, when they received the bonds, knew that they were her property; and that if these bonds were so received by the defendants it was without consideration, or upon a contract void in law; that the defendants have refused to surrender the bonds to the plaintiff.

The defendants answered that they held a bond of Edward Matthews for \$250,000, secured by mortgage upon real estate in the city of New York, as security for the notes of Nathan Matthews, a brother of Edward, exceeding \$200,000; that Edward was desirous of obtaining a surrender of this bond and mortgage, and delivered to them the railroad bonds, March 6, 1877, in consideration of such surrender. They state fully the circumstances of this transaction, and annex to their answer a written agreement between them and Nathan and Edward Matthews concerning the same. They allege that Edward Matthews is the real party plaintiff, and that the title of Virginia B. Matthews is nominal and colorable.

The plaintiff amended her bill, and set up the same facts in respect to the exchange of the railroad bonds for the bond and mortgage which had been stated in the defendants' answer, and averred that the bond and mortgage were given as security for certain notes of Edward Matthews which were void for usury by the laws of New York, where they were delivered and negotiated; that the defendants held the bond and mortgage as trustees for one Thomas Upham and his creditors; that before the agreement for the exchange was made, Nathan Matthews falsely represented to Edward that Thomas Upham, or the defendants, held \$200,000 of the notes of Edward, for which the bond and mortgage were given as collateral; that, when the exchange was made, the defendants and their attorney falsely made a similar statement; whereas, in fact, Upham and the defendants, as his trustees, held the bond and mortgage as security for the notes

of Nathan, only excepting one note, of \$5,000, which had been indorsed by Edward for the accomodation of Nathan, which was not one of the notes intended to be secured by said bond and mortgage; that Edward was induced by these false representations to assent to the transfer of the bond and mortgage to Upham, and to the exchange of the railroad bonds for this original security. It repeats that the whole transaction was void for usury, and adds that the mortgage had become of no value (meaning by the depreciation of real estate) before the exchange was made. To the amended bill an appropriate answer was filed, denying fraud and knowledge, and insisting on the validity of the transaction.

The evidence tends to show that the bonds in controversy were, at one time, the property of Edward Matthews, and, excepting 50 per cent. of the Memphis & Little Rock bonds, the title to which is not traced, were a part of a larger number by him assigned to his brother, Watson Matthews, in trust for Mrs. Matthews, his wife, the now plaintiff, as security for an indebtedness, the amount of which is not stated, of the husband to the wife, and that they were afterwards sold at auction by the trustee, and bought in by J. Brandon Matthews, the plaintiff's son, for her account. All this time the bonds were in the hands of pledgees, and there was no delivery of them to Mrs. Matthews, and no notice to the holders, but the transfers were on paper only. Afterwards, by some person unknown, a part of the Carolina Central bonds were redeemed, and were put in the safe of a deposit company which was hired by Mrs. Matthews, and of which she and her son had keys, but her husband had none. Other bonds were placed in the same safe from time to time. Whenever Edward Matthews wished to sell or pledge any of these bonds he did so, his son furnishing them on demand. Others were afterwards substituted, and then again used as Edward's occasions might require, and so on.

Where the money came from that Edward had borrowed of his wife does not appear, and there is no evidence that the bonds were her separate property, except as that is to be inferred from the general statement that they were hers.

Mrs. Matthews was not examined as a witness. Books which were kept for her by the clerk of Mr. Matthews are not produced. The witnesses, except to the paper title, are Edward Matthews and his son, who, having given these bonds to the defendants, testify that they had no authority to do so.

It was not seriously denied, in the argument of the counsel who closed the case, that the facts show full authority for Edward Matthews to deal with all the bonds in his wife's safe as he chose; nor could it be denied with any hope of success. It seems, then, that the witnesses who testified to the want of authority must have intended to say merely that there was no express authority. There was as much right to take the bonds out of the safe as there ever was to put them in.

To my mind the evidence proves more than a right by Edward to use the bonds. It proves that they were his for all purposes for which he chose to use them. The case, therefore, must be decided upon the amended bill, which alleges that, considered as a contract and dealing with Edward Matthews himself, the defendants have no title. The contention from this point of view is that Edward Matthews was induced by the fraud of his brother to consent, as he did consent, in writing, to the assignment of the bond and mortgage to Upham, and that Upham had knowledge of the fraud; or that the mortgage was void because it was given to secure notes tainted with usury; or that, being given to secure certain notes, it was of no value when separated from them. It is clear that Upham had lent a great deal of money to Nathan Matthews, and that he held valuable securities for its repayment, which he surrendered in exchange for the bond and mortgage of Edward Matthews; and that he had no notice or knowledge of any dealings between the brothers which would injuriously affect his title. Upon the preponderance of evidence I find that Edward made the mortgage with knowledge that it was to be used to secure whatever debts Nathan owed Upham; or that it was so made and assigned that Upham had, as against Edward, the right to believe so.

The alleged fraud does not attack the mortgage itself, but

only the assignment of it to Upham. It was given, according to this theory, to secure certain notes, and the fraud consisted in a false statement that Nathan would assign with it a corresponding amount of the notes; whereas, he, in fact, negotiated those notes to other persons, thus creating a double liability. But the mortgage itself, having been lawfully given for the notes, unless avoided by usury, stands as their security. Edward Matthews is in bankruptcy, and the notes are still outstanding, unpaid, to a greater amount than \$200,000. Therefore, the only persons who can at present complain that the mortgage has been separated from the notes are the holders of them. Neither Edward Matthews nor his wife have an equity apart from these holders; and, if they can maintain a bill, can only do so by making these persons parties, and by asking for a wholly different relief from that which the plaintiff now asks.

Were the bond and mortgage wholly void, from the beginning, for usury? If they were, I should incline to think Edward Matthews estopped to show it; but, at all events, one who asks relief in equity on this ground, must first offer to repay the money actually lent. As a general proposition this is admitted; but there is a statute in New York which authorizes the borrower to obtain such a surrender, in equity, without payment. This statute is so strictly construed that it has been held not to apply to an assignee in bankruptcy of the borrower, (*Wheelock v. Lee*, 15 Abb. Pr. [N. S.] 64; S. C. 64 N. Y. 242;) nor to a purchaser of an equity of redemption of land upon which there is an usurious mortgage, (*Bissell v. Kellogg*, 65 N. Y. 432.) It seems to me, however, that if a borrower pledges the property of a third person for his debt, that person must be so far identified with the borrower as to have all his rights at law and in equity. If I say that Mrs. Matthews is only a nominal holder for her husband, bound by his obligations in respect to the property, how can I refuse her the same rights which he would have to the same property? However this may be, the statute of New York, which authorizes a borrower to obtain a cancellation of securities without payment, cannot bind a court of equity out of the

v.6,no.5—30

state, and does not undertake to do so. When a borrower comes into equity in Massachusetts, or in the circuit court, he must do equity, as understood by the court in which he sues. If, then, the defendants held the notes for which the bond and mortgage are said to have been given, and if they were so given, there could be no redemption without payment.

For these reasons the complainant is not entitled to the relief which she seeks. Bill dismissed, with costs.

STRAFER, Assignee, v. CARR.*

(District Court, S. D. Ohio. April 7, 1881.)

1. COSTS—ATTORNEY'S DOCKET FEE—REV. ST. § 824.—JURY TRIAL.

In a case which had been twice tried to a jury and the jury had each time disagreed, and at a subsequent term the case was dismissed, *held*, that under section 824 of the Revised Statutes, an attorney's docket fee of only five dollars is taxable.

2. SAME—"TRIAL BEFORE A JURY"—CONSTRUCTION.

The phrase "trial before a jury," in said section, applies only to cases in which a controversy is terminated by a verdict of a jury and a judgment thereon.

Motion to Retax Costs.

Bateman & Harper, for motion.

J. F. Follett and Thos. Millikin, *contra*.

SWING, D. J. Peter Schwab was adjudicated a bankrupt, and plaintiff was appointed his assignee, and brought this suit to recover from the defendant assets of the estate of the bankrupt. In 1874 the case was submitted to a jury, which failed to agree and was discharged. In 1875 the case was again submitted to a jury, which, also failing to agree, was discharged; and in 1880 the plaintiff came into court and dismissed his case. Upon such dismissal the costs were taxed against the plaintiff, including a docket fee of \$20,

*Reported by Messrs. Florian Giauque and J. C. Harper, of the Cincinnati bar.

which the plaintiff objects to, and files this motion to retax the costs as to that particular item. The plaintiff claims that by the laws of the United States there should have been taxed a docket fee of five dollars instead of twenty. Whether the docket fee shall be five or twenty dollars depends upon the construction of section 824 of the U. S. Revised Statutes. This section provides, among other fees of attorney, that there shall be, "on a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of \$20, providing that in cases of admiralty and maritime jurisdiction, where the libellant recovers less than \$50, the docket fee of his proctor shall be but \$10; in cases at law where judgment is rendered without a jury, \$10; in cases at law where the cause is discontinued, \$5." These are the only provisions of law which bear upon the question presented, and its determination depends upon the construction which shall be given to them.

The defendant claims that when a jury has been empannelled and the case fully submitted to it for determination, it is a "trial before a jury" within the letter and spirit of the law, although they may be unable to agree and shall be discharged. But the plaintiff claims that such a trial is not a "trial before a jury," as contemplated by this law, but in order to bring it within the provisions of the law it must have been a trial which resulted in a verdict by which the rights of the parties should be determined. The other provisions by which docket fees are given are only upon the existence of the means by which the case is finally disposed of. In equity and admiralty it is upon the *final hearing*; in cases at law where *judgment is rendered* without a jury; and in cases at law where the cause is *discontinued*. I know it may be said that the purpose of the law was to give a docket fee in proportion to the labor performed, and in this view it was as much a "trial before a jury" as if they had agreed; but so it may be said that there might have been a hearing in equity which involved more labor than the final hearing, but it is only upon a *final hearing* that a docket fee is to be taxed. In a general sense it may be true that there had been a "trial

before a jury" when the jury had been sworn and the cause fully submitted to it, although they had disagreed and were discharged. But if this is to be the sense in which it is to be construed, then each time the cause was submitted to a jury and they failed to agree, would be a "trial before a jury," and a docket fee might be taxed. I do not think that this was the sense of "*trial before a jury*" contemplated by the statute. I think it was intended to apply only to such cases in which the controversy was disposed of by the verdict of a jury and judgment was rendered thereon; but if a jury disagreed and were discharged, the case remained in all respects as if the matter had never been submitted to a jury. No trial had been had, and the plaintiff could come into court and discontinue his cause; and if he did so, in the taxation of a docket fee, the case must be treated as discontinued, and a docket fee of five dollars only should be taxed.

The motion must, therefore, be sustained, and the clerk in the retaxation will tax a docket fee of five dollars instead of twenty.

SILL, Assignee, etc., v. SOLBERG.

(Circuit Court, W. D. Wisconsin. April 5, 1881.)

1. **EQUITABLE RELIEF—FRAUDULENT PREFERENCE—CONTINGENT LIABILITY—INDORSER.**

The fraudulent appropriation of the assets of a bankrupt to the payment of a note before maturity, at the request and for the benefit of the indorser, is a proper subject for equitable relief in a bill to charge the indorser.

2. **SAME—SCOPE OF REMEDY.**

Where there are such grounds for equitable relief as to part of the substantial matters set out in the bill, equity will take cognizance of the whole.

3. **FRAUDULENT PREFERENCE—REV. ST. § 5128.**

Such appropriation for the benefit of the indorsee constitutes a preference within the meaning of section 5128 of the Revised Statutes.—[ED.]

In Equity. Demurrer.

S. U. Pinney, in support of demurrer

C. W. Bunn, *contra*.

DYER, D. J. This is a demurrer to a bill in equity brought by the complainant as assignee of Wilson & Kiene, bankrupts. The bill sets out the following state of facts: On and prior to the twenty-ninth day of August, 1878, Wilson & Kiene, as copartners under that firm name, were and had been doing business in La Crosse as retail dealers in pork, hams, lard, etc. On that day they were adjudicated bankrupts, and the complainant was subsequently appointed assignee. On the twenty-eighth day of August, 1878, the bankrupts were indebted to the La Crosse National Bank in the sum of \$5,000, as the makers of a promissory note, dated May 30, 1878, payable to the order of the bank, and due August 31, 1878, and on which the defendant, Solberg, was indorser. The bankrupts were also at that time largely indebted to various other persons, and had not sufficient property to pay their indebtedness, nor did they have bankable assets with which to pay their note held by the bank, of which fact the defendant had knowledge. This being their condition on the day last mentioned, August 28th, Wilson, acting for the firm, but without the knowledge or consent of his partner, sold and delivered to the defendant their entire stock in trade, alleged to be then worth \$3,000, and in payment therefor took the defendant's note for \$2,464.14. The defendant was at the same time indebted to the bankrupts in the sum of \$1,333.16 on open account, and for this amount he then gave to the firm his note. On that day the bankrupts had in hand \$494.30 in cash, and also held notes against various persons, amounting in all to \$792.81, all of which he indorsed except one note, which, without indorsement, was bankable paper. The bankrupts, or one of them, at the request of the defendant, then took the two notes so made by him, also the notes against third parties which he had indorsed, and the cash which they had in hand, to the bank, and took up their \$5,000 note, upon which the defendant was contingently liable as indorser.

It is alleged that this payment was made for the purpose

of releasing the defendant from his liability on the \$5,000 note, and for his benefit, and it is further averred that all the acts before recited were done in pursuance of a fraudulent combination and arrangement between the defendant and one of the bankrupts to give the defendant a preference over the general creditors of the firm. Suitable allegations are also made of the insolvency of the bankrupts at the time of these transactions, and that the defendant had reasonable cause to believe that they were then insolvent, and knew that the transfers and payments were made in fraud of the bankrupt law; and the prayer of the bill is that the sale and transfer of the stock of merchandise to the defendant, and the payment and transfer of the assets before mentioned to the bank, for his benefit, be declared void and set aside, as between the complainant and defendant, and that he be deprived of all benefit arising to him therefrom. Also that he be charged with the value of the assets so transferred and paid for his use and benefit, and be decreed to repay the same; that an account be taken of the value of the merchandise; that the defendant be charged with the excess of such value over what he paid therefor, and that he be decreed to pay the same to complainant.

The bill is demurred to on two grounds: (1) That complainant's remedy is at law; (2) that upon the allegations of the bill the complainant is not entitled to the relief he seeks.

1. It is contended by counsel for the defendant that this bill is in substance a declaration, in case that no discovery is sought, that no such account is needed as involves the exercise of equity jurisdiction, and that, in short, the bill contains no allegations disclosing a necessity for resorting to a court of equity. It is provided by statute of the United States (section 723, Rev. St.) that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." This is merely declaratory of the pre-existing rule. *Parker v. Cotton & Wool Co.* 2 Black, 545. Many authorities were cited by counsel on the argument in support of and

against the proposition that the present bill shows no grounds for recourse to equity. In the cases cited in support of the demurrer, the question of the right to equitable relief arose in various forms, and from them all this summarized statement of the law may be deduced: that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. *Hipp v. Balin*, 19 How. 278.

The case most nearly parallel to this, cited in support of the demurrer, is *Garrison v. Markley*, 7 N. B. R. 246, which was a bill to recover the value of a stock of goods alleged to have been transferred by the bankrupts to the defendant, a creditor, with a view to give him a preference, in fraud of the bankrupt law, and in which it was held that the remedy at law was plain and adequate, and jurisdiction in equity was therefore declined. That case, it is to be observed, involved only the recovery of the value of property which the creditor had directly received from the bankrupt. That was all there was of it, and therefore trover was a suitable and complete remedy. The present bill, as we shall see, discloses some features not present in *Garrison v. Markley*.

In many of the cases referred to by counsel for the complainant the question of equitable jurisdiction was not directly raised, and was therefore only impliedly decided. In some of these cases, and in others where the question arose for distinct adjudication, it was sought to set aside conveyances of land, or mortgages on personal property, or transfers of securities, and none of them are directly in point as parallel cases to the present; though it would seem that *Flanders v. Abbey*, 6 Biss. 16, is a case which, if it is to be regarded as authoritative in its full extent, would support jurisdiction in equity, even upon such a state of facts as existed in *Garrison v. Markley*, *supra*.

Cady v. Whaling, 7 Biss. 430, was a bill to reach property transferred by the bankrupt to his wife, and involved the

avoidance of a voidable legal title in the wife. A part of the property in controversy consisted of policies of life insurance, and the peculiar features of the case, when taken together, were such as to make it quite apparent that a recourse to equity was the only effective remedy.

None of the cases cited on either side disclose such similarity to the case made by the present bill as to make them applicable, except as they enunciate general principles. This demurrer must, therefore, be decided by applying the general rules or principles relating to equity jurisdiction to the facts alleged in the bill. If equity declines to take cognizance of this case, it is because the remedy at law is plain, adequate, and complete. Such remedy must be plain, for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. 1 Story, Eq. Juris. § 33. If the transaction in question was attended by or has given rise to circumstances on account of which a judgment at law will fall short of doing full and complete justice between the parties, or on account of which there is difficulty in reaching the full merits of the case under the rules of law, or where there is even a reasonable doubt as to the remedy at law being plain, adequate, and complete, equity will always take and retain jurisdiction. *Garrison v. Markley, supra*. To these general rules may be added another, which is that if there are grounds for equitable relief as to part of the substantial matters set out in the bill, equity will take cognizance of the whole.

If the entire subject-matter of the suit consisted of the sale and transfer to the defendant of the bankrupt's stock of merchandise, the remedy at law would undoubtedly be adequate and complete; for the goods were delivered directly to the defendant. They came to his hands, and were converted by him, and trover would lie for their value. In such case it would not do to say that, because fraud was involved, the jurisdiction of a court of equity might be invoked concurrently with that of a court of law. That rule is subject to excep-

tions, and, in view of the exceptions, Judge Story, in speaking of cases involving fraud, states the rule in this language: "It may, therefore, be said that the concurrent jurisdiction of equity extends to all cases of legal rights where, under the circumstances, there is not a *plain, adequate, and complete* remedy at law." So, also, it may be that, as to the debt for \$1,333.16 due from the defendant to the bankrupts, and for which he gave them his note, an action at law would lie to recover the amount of that debt as if no note were given, and as if the debt remained unpaid. Indeed, it seems quite clear that, if the note was given and used to enable the defendant to secure protection against his liability on the note held by the bank, and thereby to get a forbidden preference, an action at law to recover the original debt owing by him to the bankrupts would be an ample remedy, if the transaction makes him liable in any form of action. But, according to the bill, the alleged fraudulent purchase of the stock, and the giving of the note for \$1,333.16, do not constitute the entire subject-matter of the action. It is charged, as we have seen, that certain moneys of the bankrupts, and certain promissory notes held by them against third parties, were also applied on the bank indebtedness, for which the defendant was contingently liable; and it is alleged that the appropriation of these assets was made in pursuance of a scheme entered into between the defendant and the bankrupts. This means that it was arranged between those parties that the assets of the bankrupts should be exclusively applied in payment of the one debt owing to the bank, instead of applying them *pro rata* upon all the liabilities of the firm; and the bill seeks to charge the defendant with the moneys and assets thus used, because of his alleged participation in the transaction. Is there not shown in this phase of the case grounds for equitable relief, if the defendant is chargeable in any proceeding whatever? The question, I think, must be answered in the affirmative; for it is not perceived how the defendant could be made answerable in an action at law for the alleged fraudulent appropriation of the moneys which the bankrupts had in hand, and the notes which they held against third parties. Those moneys did

not come to the hands of the defendant, and so he would not be liable for them in an action for money had and received. Nor were the notes last mentioned converted by him in such manner as to enable the complainant to enforce liability in an action of trover. These moneys and notes remained all the time in the hands of the bankrupts until they were delivered to the bank to be applied in payment of the \$5,000 note; and, if personal responsibility for them can be fastened upon the defendant at all, it is because the appropriation of them to the payment of the bank indebtedness was made to protect him against a contingent liability, and was therefore for his benefit, and because he was a party to the transaction. The methods pursued to accomplish the object in view, according to the averments of the bill, were circuitous, and any liability of the defendant arising from the use made of the moneys and notes referred to is one springing from the application of equitable principles to the transaction, and only enforceable in equity. As the defendant derived the benefit he sought by indirect and circuitous means, and not by personal appropriation or conversion of the property, the transaction can only be unravelled by a court of equity, which may, if a case is made upon the proofs, charge him in equity with the value of these moneys and notes; and this is one of the results sought to be attained by the bill. Since, therefore, under the rule before stated, equity has jurisdiction as to part of the subject-matter of the bill, it may take cognizance of the whole. The first ground of demurrer must be held untenable.

2. It is insisted, however, that the bill makes no case for relief in law or equity, and the grounds urged in support of this point are that the use made of the assets of the bankrupts was not a payment to the defendant, nor to his use, as he had not been charged with a fixed liability on the note held by the bank, and owed no one on account of the note; that the action should have been brought, if at all, against the bank, as the party receiving the payment and realizing the sole legal benefit thereof, and if the bank received the money innocently, then there was no unlawful preference. I think this view of the case made by the bill is unsound. The stat-

ute, (section 5128, Rev. St.,) though it does not specifically name indorsers, is broad in its terms and meaning. It provides that "if any person, being insolvent, * * * within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person * * * *who is under any liability for him,* * * * makes any payment, * * * transfer, or conveyance of any part of his property, *either directly or indirectly,* * * * the person receiving such payment, * * * transfer, or conveyance, *or to be benefited thereby,* having reasonable cause," etc.

This language manifests an intent to prevent any evasion by indirect payments or dispositions of property. It is true that the defendant's liability on the note to the bank had not been fixed; but within the meaning of the law he was under a liability for the bankrupts. He had assumed the liability of an indorser, which was contingent at the time, and which might or might not become absolute. It was such a liability as would have supported a security passing from the makers of the note to the indorser to indemnify him against loss. The transaction, as it is set out in the bill, amounted to a scheme between the bankrupts and the defendant, whereby, in anticipation of the maturity of the note, and for the purpose of protecting the indorser against absolute liability and ultimate payment, it was arranged that through the intervention and co-operation of all the parties the assets of the bankrupts should be appropriated to the payment of the note and consequent benefit of the indorser. True, the payment was not directly to the indorser, but in equity it was equivalent to that, if the facts are as stated in the bill, and equity will look through the transaction and see if it is within the spirit and meaning of the law, if not its letter. If the defendant had taken directly the securities and assets of the bankrupts for the purpose of applying them in payment of the note held by the bank, and had so applied them, and if the other required conditions had existed as alleged in the bill, there could be no question that it would have been within the inhibition of the statute. As the case is stated in the bill, has the defend-

ant not done what, in the consideration of a court of equity, is equivalent to that? He was under a liability for the bankrupts, and payment was so made as to relieve him from that liability, and thereby benefit him; and it is not to be overlooked,—for this is a vital element of the bill,—that this was done in pursuance of a scheme or fraudulent device between the bankrupts and the defendant which enured to the benefit of the latter at the expense of other creditors. Thereby he as effectually secured a preference as if the assets had been paid to him directly, and he had then personally appropriated them to the payment of the note.

In *Bartholow v. Bean*, 18 Wall. 635, the question was whether a payment by an insolvent, which would otherwise be void as a preference, was not excepted out of the provisions of the law, because it was made to a holder of his note, overdue, on which there was a solvent indorser whose liability was fixed; and it was held that it was not. Justice Miller, in the opinion, says that "the statute in express terms forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him.

* * * It is therefore very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor; and that if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee. If the indorser had paid the note, as he was legally bound to do when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him; or if the money had been paid to him directly, instead of the holder of the note, it could have been recovered; or if the money or other property had been placed in his hand to meet the note, or to secure him instead of paying it to the bankers, he would have been liable." This language is plainly expressive of the view that if, in advance of his liability being fixed, an indorser takes the bankrupt's property to meet the note which he has indorsed, when it shall mature, or to secure himself against loss, he will be liable as accepting a preference. And it would seem that if

this is done by indirect and evasive methods, the result in equity must be the same as if direct means were resorted to.

In *Bean v. Laflin*, 5 N. B. R. 333, it was held that an indorser of a note who receives none of the proceeds of the same, and whose contingent liability never becomes absolute, cannot be compelled to pay to the bankrupt's assignee the amount of the note paid by the bankrupt to the holder. But in this case the maker of the note paid it at maturity without calling on the indorser or surety, and was then carrying on his business, and so continued for a considerable time thereafter; and, moreover, the surety was not a participant in any scheme for the appropriation of the bankrupt's property to save himself from ultimate obligation to pay the note. It may be added, further, that some of the doctrine of the opinion in this case is quite irreconcilable with principles laid down in *Bartholow v. Bean*, *supra*. As bearing upon the question under consideration, and as tending to sustain the views which have been expressed, the cases of *Ahl v. Thorner*, 3 N. B. R. 118, and *Cookinham v. Morgan*, 5 N. B. R. 16, are not without force.

I think the bill should be answered. Demurrer overruled.

MAIN, Assignee, etc., v. BROMLEY and others.

(District Court, W. D. Wisconsin. ———, 1881.)

1. ASSIGNEE IN BANKRUPTCY—VOID SALE—SUIT TO ENJOIN ACTION BETWEEN CREDITORS IN STATE COURT.

A suit to set aside a sale, void under the bankrupt law, and to enjoin the vendee from prosecuting a suit in the state court against the attaching creditor of the bankrupt vendor for the taking of the goods sold, cannot be maintained by an assignee in bankruptcy, where he has obtained possession of the property, and is no party to the proceedings in the state court.—[Ed.]

In Equity.

Finches, Lynde & Miller, for assignee.

F. J. Lamb, for defendants.

BUNN, D. J. This is a suit in equity, brought to have a certain sale of goods by the bankrupt to defendant Bromley, had a few days previous to the filing of the petition in bankruptcy, declared void and set aside, and to enjoin the defendant Bromley from prosecuting a suit in the state courts against the other defendants, Bacon, Goodrich & Johnson, to recover damages for taking the goods from Bromley on attachment against the bankrupt, issued from a justice's court after the sale to Bromley and before the proceedings in bankruptcy were begun. The bankrupt was a small merchant, doing business in Jefferson county, and on the seventeenth of April, 1875, being indebted to Bromley in the sum of \$400, upon a promissory note given for borrowed money, and being unable to pay in cash, executed a bill of sale of the remnant of his stock of groceries to pay the note, representing at the time that it was all he had to pay with, and that he did not owe any other debts. Bromley did not want the goods, but the evidence shows bought them in entire good faith as the only means of getting his debt. A few days after, on April 28th, Bromley having possession of the goods under the bill of sale, the other defendants, Bacon, Goodrich & Johnson, wholesale merchants in Milwaukee, caused an attachment to be issued in justice court against Giles, afterwards the bankrupt, upon a claim of \$169.15, and attached the goods in the hands of Bromley, the deputy sheriff seizing them and taking them into his possession on the attachment as the property of Giles. Thereupon Bromley commenced an action of trespass against Bacon, Goodrich & Johnson, and one Hutchinson, the deputy sheriff, in the circuit court of Jefferson county, to recover damages for seizing the goods and taking them from Bromley under the attachment.

On May 1st, immediately following, Giles filed a voluntary petition in bankruptcy and was adjudged a bankrupt. Thereupon, upon the affidavit and application of Bacon, Goodrich & Johnson, who still held the goods under the attachment, this court issued a general warrant to the marshal, as messenger, to seize all the goods and property of the bankrupt, and

these goods were voluntarily turned over to the marshal, by the deputy sheriff, under the direction of Bacon, Goodrich & Johnson, as the goods of the bankrupt.

Bromley's action for trespass came on to trial in the circuit court of Jefferson county, and the jury, under the instructions of the court, found a verdict of nominal damages, merely, for the plaintiff, on the ground that though the sale to Bromley was a valid sale under the state law, that it was void under the bankrupt law, and that under that law Bromley had no title to the goods and therefore could only recover nominal damages.

The case was appealed to the supreme court, and reversed, (see *Bromley v. Goodrich*, 40 Wis. 131,) the court holding that the state court should not take jurisdiction to adjudicate a sale that is valid under the state law to be void under the provisions of the bankrupt law, in the absence of any adjudication on the point by the federal court; and that this sale to Bromley being a valid and *bona fide* sale under the state law, the court should have held it so, and allowed the plaintiff to recover in that suit the value of the property taken. The case was thereupon sent back to the circuit court of Jefferson county for a new trial. This suit is brought here to stay the trespass case in the state court, and the questions presented are whether or not this court has jurisdiction to stay the suit, and whether the bill and the proofs show any equity on the part of the assignee.

The suit sought to be stayed is between certain creditors of the bankrupt, and relates to property that has since come into possession of the assignee as his representative, and I am satisfied, from the testimony, that though Bromley purchased the goods in entire good faith and for a full consideration paid, that the transfer was invalid under the provisions of the bankrupt law, and that the goods were properly turned over to the marshal, as messenger, and by him to the assignee; and if these facts constitute a sufficient ground on which to maintain the suit, then the plaintiff is entitled to the relief sought.

But without questioning the jurisdiction of the court in a proper case to stay proceedings in a state court where the assignee is a party, or where his rights as assignee are in any way to be affected by the litigation, I cannot see that in this case the plaintiff has any sufficient ground in equity to stand upon. He is not sued. He is in no sense a party to the litigation. The fund he represents is in no danger. His rights as assignee to the property are in no way being menaced or questioned. The little property there was, was voluntarily turned over to the marshal. About one-half the goods, or \$200 in value, was set off to the bankrupt by the assignee as exempt under the laws of Wisconsin, and approved by order of the court. The rest of them have been sold by the assignee and turned into money, the avails, about \$206, being now in the hands of the assignee, ready to be distributed.

Under these circumstances, there would seem to be no sufficient reason for setting aside the sale to Bromley, or staying proceedings in the state court.

If anything was to be gained by it to the assignee, and so to the creditors generally, then the suit would be proper; then would there be a reason for its existence. Or if the property was still held by Bromley, and a suit was necessary to recover it, there would then exist a good reason for bringing the suit to set the sale aside and recover the property. So if the assignee were sued in the state court for taking the property. But aside from some such motive of benefit or interest to the assignee, as the representative of all the creditors, it is difficult to see what ground the assignee has to stand upon to maintain a suit to set aside a sale held valid under the state law, and to stay litigation between two creditors of the bankrupt. The suits which the assignee can maintain should be for the benefit of the creditors generally, and not in the interest of a particular creditor only.

The assignee may safely look on and see litigation go on between certain creditors, so long as he is in no way a party to it, and cannot be bound or in any way affected by the results of such litigation. It is time enough for him to

act when his rights as assignee are menaced, or it is necessary to institute litigation to have those rights protected or ascertained.

In this case he has confessedly all the property the bankrupt had, and is in no danger of losing it. There is, therefore, no sufficient motive for the suit. The bare fact that the sale was void is no reason for setting it aside, so long as the assignee has the property, and all that he could obtain in any event by the most successful litigation.

The bill is dismissed.

**Doty and others, Assignees, etc., v. Johnson and others,
Administrators, etc.**

(District Court, N. D. New York. March 3, 1881.)

1. STATUTE OF LIMITATIONS—DEBT OWING BANKRUPT—REV. ST. § 5057.

The limitation prescribed by section 5057 of the Revised Statutes, in relation to suits "between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or invested in such assignee," is applicable to an action brought by the assignee to collect a debt owing to the bankrupt.

2. SAME—ASSIGNEE DEBTOR TO BANKRUPT—REV. ST. § 5057.

Where, however, the debtor is the assignee of the bankrupt, the statute does not begin to run until the death of the assignee.

3. SAME—Co-ASSIGNEE—ESTOPPEL.

The representatives of such assignee are estopped from claiming, upon his death, that an action could have been maintained by his co-assignee within the time limited by the statute.

4. SAME—REPRESENTATIVES OF DECEASED ASSIGNEE—STATE STATUTE.

Suit must be brought against the representatives of such assignee within the time limited by section 5057, although under the provisions of a statute of the state of the deceased assignee the term of 18 months was not to be deemed any part of the time limited by law for the commencement of actions against his administrators.—[Ed.]

Thos. Corlett, for plaintiffs.

W. C. Ruger, for defendants.

v.6,no.5—31

WALLACE, D. J. The defendants maintain that the action is barred by the statute of limitations. I agree with the defendants that section 5057, U. S. Rev. St., which enacts "that no suit, either at law or equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee," is applicable to an action brought by the assignee to collect a debt owing to the bankrupt.

The later authorities in the federal courts are to this effect, and certainly every reason which can be advanced for a limitation of the kind applies with as much force to such a cause of action as to one brought to recover specific property. These authorities, as well as those which intimate a different view, are cited in *Walker, Assignee, etc., v. Tanner*, 16 N. B. R. 285, where the limitation was applied to a cause of action like the present. See, also, *Foreman, Assignee, v. Bigelow*, 18 N. B. R. 457.

The statute, however, did not begin to run in Johnson's life-time, because he was one of the assignees of the bankrupt, and remained such assignee until his death. The statute of limitations is not intended to apply to claims for the recovery of which the party entitled thereto could not maintain an action. A party cannot be both plaintiff and defendant in an action at law. *Maffat v. Van Mulliger*, 2 Chitty, 539; 2 B. & P. 124; *Teague v. Hubbard*, 8 B. & C. 345. Accordingly it has been held that where money is lent by a *feme covert*, having a separate estate, to her husband, the statute does not begin to run against the debt until the death of the husband, for on account of the unity of the husband and wife the latter cannot sue the former. *Towers v. Hugner*, 3 Whart. (Pa.) 48.

Statutes of limitation do not extinguish the debt or claim; they only form a bar to the remedy of the party to recover it by action, and they can only operate upon the remedy from the time when the remedy is available. Therefore, a

statute of limitations does not run while there is no person against whom suit can be brought, as where, until administration has been granted, a statute of limitations does not operate upon a claim against the estate, because there is no one who can be sued. *Lewis v. Broadwell*, 3 McLean, 568.

Assuming, however, that Johnson's co-assignees could have maintained an action against him for the demand while he was assignee, his representatives are estopped from availing themselves of the defence. He was a trustee whose duty required him to enforce all claims existing in favor of the estate. He was responsible for any default of his co-assignees in this behalf, and could no more take advantage of their laches or misconduct than he could of his own misconduct in failing to bring an action that should have been brought. His administrators cannot avail themselves of a defence which he would not have been permitted to set up. This action was not brought until three years and over had expired after the administrators were appointed. I am constrained to hold that the statute of limitations began to run when the administrators were appointed and had qualified, and that the action is therefore barred.

The statutes of this state enact that the term of eighteen months after the death of any intestate shall not be deemed any part of the time limited by law for the commencement of actions against his administrators, and the plaintiffs insist that the period of eighteen months is not to be computed in applying the limitation. The answer to this argument is that the state statute does not prevent the bringing of an action against the administrators within the eighteen months. If it did in terms do this, the prohibition could not affect the right of a plaintiff to bring a suit, which the laws of congress authorize him to bring at any time. The laws of the United States are supreme within their constitutional limits, and a right which they confer cannot be abrogated or curtailed by state legislation. The bankrupt act, as a measure of policy to secure the speedy settlement of estates, authorizes a defendant to defeat an action if it is not brought within two years. No state could deprive him of this right, and thus

frustrate the policy of the bankrupt act, without invading the domain which belongs exclusively to a higher sovereignty. The state statute does not attempt to do this. It merely suspends the operation of its own statute of limitations.

Judgment is ordered for the defendant.

BROWN v. DEERE, MANSUR & Co. and others.

(Circuit Court, E. D. Missouri. January, 1881.)

1. INVENTION—ROTATORY SEED-WHEEL.

The substitution of an intermittent rotatory seed-wheel for an oscillatory seed-wheel, with the addition of the devices necessary to effect such rotatory motion, constitutes a valid and important improvement.

2. SAME—DIVISION INTO DISTINCT CLAIMS.

The supreme court having held divisional patents valid, there can be no legal objection to subdividing an invention into distinct claims.

—[Ed.]

In Equity.

TREAT, D. J. The only questions calling for especial attention are—*First*, was the patent for an improvement issued in 1865 valid? Of this the court has no doubt; for instead of an oscillatory seed wheel, an intermittent rotatory wheel was substituted,—the intermittent rotatory operations, in combination, to be effected by the devices stated, namely, the forks on the transverse bar contrived with checks, so that the wheel could be rotated intermittently, and stopped at each discharge of the seed in the check-rows. *Second*. Is the re-issue No. 6,384 valid? It contains three claims. To understand them, it is necessary to consider what was included in the improvement of 1865, and not only what was the state of the art when the patents of 1853 and 1855 were issued, but also of 1865. All that was included in the patents of 1853 and 1855 are abandoned to the public; and hence the improvement patent of 1865 and its re-issue must rest for present validity, or rather for infringement, upon the violation of the lawful rights of the plaintiff, which were acquired under said

patent of 1865 and its re-issue. Is the re-issue, as to each of its three claims, within the terms of the original patent of 1865?

It is clear that the substantial improvement consisted in a new device, which, in combination with former devices, would produce an intermittent rotatory motion, with described checks, instead of an oscillatory motion of the seed-wheels. In the re-issue the matters invented or suggested in the patent of 1865 are divided into three distinct claims. As the United States supreme court has held divisional patents valid, there can be no legal objection to subdividing the invention into distinct claims. So far as the present inquiry is concerned, there is nothing new in horizontal reciprocal seed-wheels, a transverse reciprocating bar, and a hand-lever, operated in combination, nor was there in said combination operating in connection with the valve in the seed-tube. Now, if an intermittent rotatory seed-wheel was substituted for an oscillatory wheel, and devices given for effecting such rotatory motion, consisting of forks on the transverse bar, and checks on the wheel and bar, constructed as described, a valid and important improvement was made. Such was the scope of the patent of 1865.

The re-issue subdivides that invention into three claims; *First*, the combination of the peculiar wheel and transverse bar with a hand-lever, so as to produce the intermittent rotatory motion, substantially as, etc. Here is an introduction into old machinery of a new and peculiar wheel and forked transverse bar, whereby, in combination with well-known devices, the desired result could be produced,—a new combination. *Second*, the combination of the described forks and toothed wheels to operate as stated. That combination shows the general structure of the forks and of the wheels and of the checks, whereby the intermittent rotatory motion was produced and stopped at each discharge of the radial seed-cups through the seed-valves. No similar combination existed previously, and as to some of the devices they were entirely new. *Third*, this claim, unless limited to the devices used in the combination, would be too broad, and therefore void. It is for a combina-

tion, literally interpreted, of *any* horizontal rotating seed-wheel in the hopper, and valve in the seed-tube, a transverse reciprocating bar, and operating hand-lever. Such a combination is open to more than verbal criticism. When, however, the recognized rules of interpretation in such cases are brought to bear, we find that this claim differs from the others only in making the rotatory wheel operate the seed-valve. Said valve had previously been operated in connection with the oscillatory wheel, bar, and lever. Hence, the introduction of the intermittent rotatory wheel, the forks on the transverse bar, and the checks or stops at certain points, enabled the three combinations to be effective in their respective operations, separately considered. Each of those claims is therefore held to be valid. As to the infringement, much might be said if the court had at its command the appliances whereby, through models and drawings, it could make its views clearly appear as to details of mechanical contrivances. In the absence of such aid it would be useless to attempt a detailed description thereof. It must suffice to state that the defendants infringe each of the plaintiff's claims, limiting them to the use, in combination, of the devices specified. The combinations are the same, and the devices used are the same, with merely colorable change as to form. The forks, seed-wheels, and checks exist in the patent and in defendants' machines in combination, substantially as set forth in plaintiff's patent.

A decree will be entered for the plaintiff accordingly, with reference to the master, Thomas C. Reynolds, to report the amount of profits and damages.

See *infra*, 487, for decision of the court upon motion for rehearing and to set aside the interlocutory decree.

BROWN v. DEERE, MANSUR & Co.

*(Circuit Court, E. D. Missouri. February 5, 1881.)***1. INFRINGEMENT—SUSPENSION OF INTERLOCUTORY DECREE—POWER OF COURT.**

The suspension of an interlocutory decree, perpetually enjoining the infringement of a patent, until an accounting can be had and a decree entered from which an appeal can be taken, rests in the discretion of the court which granted the decree.

2. SAME—SAME—SAME.

In the exercise of such discretion the court should look carefully to all the facts and circumstances involved, regarding the difference between royalties, licenses, and patent monopolies.

3. MOTION OVERRULED.

Motion to suspend the interlocutory decree for a perpetual injunction overruled under the circumstances of this case.—[Ed.]

George Harding and John R. Bennett, for plaintiff.

West & Bond and S. S. Boyd, for defendants.

TREAT, D. J. On the hearing of this cause upon the merits, it was decided that the plaintiff's patent was valid, and that the defendants had infringed the same.* A motion for rehearing is now presented substantially on the ground that the defendants have discovered since said hearing proofs of prior use and anticipations of plaintiff's patent, invalidating the same. The motion looks to setting aside the decree and permitting an amended answer to be filed, in which the newly-discovered matter may be interposed. To that motion there are valid objections: *First.* Under the rules governing such cases, the time within which such defences can be presented is prescribed by law. No adequate excuse is given for the non-presentation of the alleged defences within the prescribed time. *Second.* So far as the motion and accompanying affidavits disclose, there is no adequate reason, even if the supposed new matter had been presented in time for changing the decree.

The parties in this case had been at issue for about two years, and, after mutual indulgence as to the date of hearing,

*See *supra*, 484.

the cause was finally presented to the court upon the evidence submitted, with elaborate arguments by respective counsel. Ample opportunity had been given to the parties and counsel, and, now that a decree has been ordered, if the case is to be opened, new pleadings introduced, with the necessary delay as to the taking of evidence thereunder, the probability is that the patent will, in the meantime, have expired. The patent in question has only one year to run, which, if wasted in litigation, leaves the patentee no direct benefit from its existence, but remits him only to profits, damages, etc., recoverable from the infringers.

This court has already passed upon the main issues as made by the pleadings and evidence, and there is no sufficient ground for the motion to rehear or open the case in order to let in new pleadings, etc. The motion for rehearing is overruled.

There is another motion calling for grave consideration, viz., to suspend the injunction ordered after a full hearing, so that the defendants may not have their business destroyed pending the account with a view to a final decree, from which decree they intend an appeal with a *supersedeas*. They now offer to give a bond in any sum the court may name if a suspension of the injunction order is granted until the case has ripened into a final decree from which an appeal can be had.

The grounds of the motion are substantially that, before the hearing and decree of the court, defendants had entered into a large number of contracts to furnish their corn-planters to agriculturists in several states, and that there is not adequate time for them to reconstruct their machines so as to avoid the infringement as found without disappointing their customers, and fastening upon themselves large damages for non-fulfilment of their many contracts.

The first inquiry relates to the power of the court to grant the motion. It must be remembered that, after a full hearing on the merits, it has been decided that defendants are infringers, and all that remains for a final decree is the ascertainment of the sum of money to which defendants shall re-

spend. Pending proceedings for the ascertainment of that sum, it is asked that the injunction be suspended so that the defendants may continue to infringe, upon giving bond to answer in damages, etc., if it be finally determined on appeal that they are liable.

The underlying thought has often occurred to this court with respect to both equity and admiralty cases; and it has sought in vain to rescue litigants from the obvious mischief to ensue if its decisions should be finally reversed. Still, the United States supreme court has held, and still holds, that no case can pass under its supervision until final judgment, which final judgment, in equity or admiralty, is not when the main question as to liability is determined, but when the case is finally closed, including damages, etc., whereby the measure of liability is also ascertained. The grounds of these decisions are familiar and of great force. Cases should not go to that tribunal in a fragmentary way; that is, it should not be required to pass upon the interlocutory decrees or judgments of the lower courts, and then have subsequently to adjudicate in the same cases supplementary questions.

Such being the rule as to appeals, what remedy has a defendant intermediate the interlocutory and final decree? He may be positive in his conclusions that the court below has committed a grave error which the appellate tribunal will correct, yet great or irreparable damage will ensue if in the intermediate time the judgment of the court is not stayed—not intermediate the final decree and the decision of the supreme court against which a *supersedeas* can be had, but intermediate the interlocutory and final decree of the lower court.

On the other hand it is urged, as in this case, that a court of competent jurisdiction having decided that an infringement exists, it should not tolerate the continuance of such an infringement to the destruction, it may be, of plaintiff's rights, because the defendant, perchance, may, at a proper time, take an appeal. It is to be presumed that each court has full confidence in its own judgment, yet is solicitous for a full review, and will give the amplest opportunities

therefor. But there is an intermediate stage of the litigation to be considered.

If the trial court has, on mature consideration, given its judgment, shall it forego it because at some indefinite time thereafter an appeal may be taken? Suppose it suspends its judgment and no appeal is taken, who shall remedy the mischief thus produced? The plaintiff ought not to be left unprotected in whose favor a decision has been had, and on the other hand the defendant ought not to be deprived of his right to an appeal. The law clearly provides for all cases except that under consideration, viz., the intermediate stage between the decree for a perpetual injunction and the accounting necessary for a final decree, from which alone an appeal can be had.

The attention of the court is called to the following cases, in some of which strong *dicta* are given, and in others positive decisions made: *Barnard v. Gibson*, 7 How. 658; *Dorsey Harvester Co. v. Marsh*, 6 Fisher, 401; *Bliss v. City of Brooklyn*, 4 Fisher, 597; *Morris v. Lowell Manuf'g Co.* 3 Fisher, 51; *Sanders v. Logan*, 2 Fisher, 170; *Kirby, etc., v. White*, 1 FED. REP. 604; *Potter v. Mack*, 3 Fisher, 386; *Whitney v. Mowry*, 3 Fisher, 175.

These are noted among the many cases cited, because they sufficiently establish the rule by which the lower court should be governed, and, so far as seen, no well-considered case is in conflict therewith. The distinction between the doctrines governing a motion for preliminary injunction and the suspension of an interlocutory decree for a perpetual injunction, after full hearing on the merits, must be carefully observed. The force of these authorities is, as right reason exacts, that each court should, according to the facts presented, decide whether, in justice to the parties, the interlocutory decree should be suspended until the final determination of the suit, or take immediate effect. If such be the true rule, what is the rightful application in this case? This suit has been pending for two years or more, each party confident that the decision would be in his favor. In the meantime each has proceeded accordingly. The plaintiff had not for many years

pushed his invention or put its products on the market. Occasionally, and to a limited extent, he had manufactured and sold his rotary seed droppers, but relied mostly on his oscillatory machine. In the meantime the defendants and those with whom they are associated had put upon the market their machines and built up a large trade. It is unnecessary now to discuss the relative merits of the respective machines.

One fact, however, has not escaped the attention of the court, viz.: that the plaintiff seemingly attached very little value to his patent until the defendants and their associates introduced and popularized plaintiff's patent. Still the plaintiff's rights exist and must be protected. The defendants knew the pendency of this suit, and that it was ripe for hearing; that it could be set down for hearing at the instance of either party before the defendants made any of the contracts named in either affidavit. They are vendors of the infringing machines, and pending this suit, and while it was ready for final hearing, they entered into contracts to furnish the same, the non-fulfilment of which will subject them to serious damage. Does that fact present any just ground for permitting them to continue their infringement? Were not those contracts in their own writing? The plaintiff submits affidavits to the effect that he is prepared to supply the trade to some, if not to the full, extent of the demand. This is not a case where the patentee relies upon the sale of licenses or a royalty, but where he maintains his monopoly both as manufacturer and vendor. The patent has about a year to run. All that he can derive therefrom must come to him through his monopoly within that time. Hence the importance to him of having the interlocutory decree take immediate effect. Some courts in special cases seem to place stress on the fact that the life of a patent is about to expire, when asked to suspend the operation of an interlocutory decree; their judgments, it is to be supposed, resting upon the thought that the injury to the plaintiff must be slight, for which full compensation can be given, while on the other hand the defendant may be largely damaged if he is not permitted to

continue his infringement for the brief interval prior to the termination of the patent. Can such considerations affect questions of right? Will a court permit a wrong to continue because the continuance of the wrong, if not stopped, will soon come to an end? The fact that a plaintiff's monopoly is about to expire makes it the more important that he should enjoy it unmolested during its brief continuance.

There are some aspects of this case which incline the court, if it could be done within legal rules, to grant the motion made by the defendants; but having determined on full hearing what are the respective rights of the parties, it discovers nothing in the affidavits to justify any suspension of the injunction ordered. An additional suggestion should be made. If the defendants give bonds and pursue their infringements pending the account to be taken before the master, when will that accounting be closed, so that a final decree can be entered? As the decree now stands, with a perpetual injunction, the account relates to prior damages, etc. What shall be done with respect to the continually-recurring damages, if the injunction is suspended? If the master's report as to the past, dating from the interlocutory decree, what decree shall be finally entered as to damages accruing subsequently thereto? Where is a final decree to be entered, so that an appeal can be had, and what shall that decree include? Must there be a new accounting ordered as to the continuing infringement? This court must make a final decree at some time, and if it permits the infringement to continue on bond given, when will it finally dispose of the case? So long as, under its permission, the infringement continues, constantly-recurring damages are suffered to accumulate.

These suggestions are made to indicate the legal and practical difficulties involved in the question, and to show that under the rule heretofore stated the court should look carefully to all the facts and circumstances involved, before granting a motion to suspend its interlocutory decree regarding the difference between royalties, licenses, and patent monopolies.

The views of this court with respect to preliminary injunc-

tions have been repeatedly announced, and in one case as to an interlocutory decree. In the latter case the thought was that after an interlocutory decree as to a product the infringer should not be permitted to put on the market an inferior product to the detriment of the plaintiff, whereby not only a competition should occur in the market, but the inferior product disparage the true product. That case can have no adequate reference to this; for it may be that the defendants' machines are, as to practical utility, superior to those manufactured by the plaintiff, still the patentee is entitled to what the law grants, and if any difficulties occur, as suggested, they are to be corrected by legislation, and not by judicial decision.

The decision of the court, therefore, is that the motion for rehearing is overruled, and the motion to suspend the interlocutory decree for a perpetual injunction is also overruled.

DARE v. BOYLSTON.

(Circuit Court, S. D. New York. December 31, 1880.)

1. LICENSE—ROYALTIES—TIME OF PAYMENT.

An agreement for an exclusive license, executed January 7, 1878, stipulated, *inter alia*, that the payments of royalty should "be made quarterly; that is to say, on the first day of January, April, July, and October, or within 10 days thereafter of each and every year" during the continuance of the agreement. *Held*, that the first payment of royalty became due on the first day of April, 1878.

2. SAME—FORFEITURE.

It was further agreed by the licensee that "if he should fail to well and truly make the payments above referred to, or to execute or fulfil any of the other conditions" contained in the agreement, that the same should be null and void. *Held*, that the failure of the licensee to render a statement or make a payment on the first day of April, 1878, or within 10 days thereafter, did not, *ipso facto*, work a forfeiture of his rights under the agreement.

3. SAME—PAYMENT OF ROYALTIES—DUTY OF LICENSOR.

Held, further, under the circumstances of the case, and in the absence of a stipulation as to the place of payment, that it was the duty

of the licensor to apply to the licensee for an account and a payment, and that he could not in the meantime, without the assent of the licensee, relicense the patent to third parties.

4. SAME—SUBSEQUENT LICENSE.

Held, further, that a subsequent license was void where the parties had notice of the prior agreement, and the same was issued without the consent of the original licensee, and after a complete tender of the royalties then due.

5. LETTERS PATENT—IMPROVEMENT IN CANOPY TOPS FOR CHILDREN'S CARRIAGES.

Letters patent for an "improvement in canopy tops for children's carriages," granted Calvin E. Fosburgh, May 29, 1877, are not void for want of utility.—[ED.]

A. v. Briesen, for plaintiff.

Edwin H. Brown, for defendant.

BLATCHFORD, C. J. Letters patent for an "improvement in canopy-tops for children's carriages" were granted to Calvin E. Fosburgh, May 29, 1877. On the seventh of January, 1878, an agreement in writing, under seal, was executed by and between Fosburgh and Charles W. F. Dare, the plaintiff, and recorded in the patent-office January 9, 1878, whereby Fosburgh granted to Dare, for and in consideration of the covenants therein contained, to be kept by Dare, the sole and exclusive right, license, and privilege to manufacture, use, and sell canopy-tops, embodying the invention covered by said patent, for the full unexpired term of the same, with the exclusive right to grant sublicenses to other parties, under said patent. As a consideration, Dare thereby agreed to pay to Fosburgh, as a royalty or patent fee, 25 cents for each canopy-top and child's carriage provided with the canopy-top made and sold by or on behalf of, or with the license or consent of, Dare, containing said invention; payments of royalty "to be made quarterly,—that is to say, on the first day of January, April, July, and October, or within ten days thereafter, of each and every year" during the continuance of the agreement,—for all the said articles made and sold by or on behalf of, or with the consent of, Dare, "during the three months preceding the respective dates of payment;" each payment to be accompanied by a statement, under oath, of Dare, setting

forth the number of said articles made, and the number sold by or on behalf of, or with the consent of, Dare, during the three months preceding each of said accounts and dates of payment. Dare also agreed thereby to keep proper books of account of the manufacture and sale, and to use his best endeavors to introduce the article into the market, and make it known to the public, and create a demand for it. Fosburgh agreed thereby to execute the necessary papers for re-issuing the patent, if, and as soon as, Dare should desire such re-issue; the expense of the re-issue, if not more than \$60, to be deducted from the royalty that might be due to Fosburgh after the re-issue. It was further thereby agreed by Dare that "if he should fail to well and truly make the payments above referred to, or to execute or fulfil any of the other conditions hereinabove contained, then and in that case this agreement and license shall become null and void."

Application for a re-issue of the patent was made January 18, 1878, on a specification signed by Fosburgh January 7, 1878, and a re-issue was granted to Fosburgh, No. 8,074, February 5, 1878. The plaintiff now brings suit against the defendant on the re-issue, alleging infringement. The answer sets up that any right granted to the plaintiff became null and void before this suit was brought, because the grant was made subject to conditions which have not been fulfilled by the plaintiff, and that the defendant has acquired, by an instrument in writing from Fosburgh, made April 7, 1878, the right to make and use and sell articles containing said invention.

The plaintiff was and is a manufacturer of children's carriages, having an office in the lower part of the city of New York, and a factory in a distant part of said city. Immediately after the execution of the instrument of January 7, 1878, Fosburgh entered the employment of the plaintiff at his factory as a painter. The plaintiff, prior to April 1, 1878, employed the patented invention to such an extent that on that day there was due to Fosburgh, as royalty, under said instrument, \$105.25, less \$60 expenses of the re-issue, leaving a

balance of \$45.25. Meantime the plaintiff had advanced the money necessary to obtain the re-issue, and had advertised the invention, and procured engravings of it for advertising. The plaintiff testifies that on the morning of April 2, 1878, he saw Fosburgh, as usual, and told him that his account was made up and ready for him down town. The plaintiff says: "He asked me how much there was due him, and I told him that I really could not tell, as I had not stopped to figure." Fosburgh testifies as follows: "On the second of April, Mr. Dare said that 'he supposed the royalty was due on the first of the month, and I think we owe you something. I haven't figured it up yet, and don't know how much it is;' or words to that effect. * * * I asked him if he had sublicensed any parties. He said he had not; that the carriage dealers were all throwing cold water on the patent. That's about all." Fosburgh denies that Dare told him, on the second of April, that the statement was ready for him. Fosburgh continued to work at the factory until and including April 9th. On April 10th he did not go to the factory. He absented himself on that day and on the 11th, without having given notice that he would not return. On the 11th he went to the place of business of the defendant, and there announced to him, or to Jay F. Butler, or to both, that his contract with Dare was broken. He saw the defendant and Butler again on the 12th, and went with Butler on that day to a lawyer, Mr. Meyer, and submitted to him the agreement with Dare, for advice as to whether it had become void. On the 15th, Fosburgh, the defendant, and Butler went to Meyer's office, and received the advice that the contract with Dare had become void. Then, on the seventeenth of April, Fosburgh and the defendant and Butler executed an agreement, whereby Fosburgh granted to the defendant and Butler the exclusive right to make, use, and sell articles containing the invention covered by said re-issued patent for its whole term, and to grant sublicenses, they to pay him a specified royalty. The instrument recites the fact that an agreement, dated January 7, 1878, had been made between Dare and Fosburgh, and that it "is now supposed by

the parties hereto to be null and void," and the grantees agree to pay all the expense of any suits that may be brought against Fosburgh growing out of said agreement, provided they be allowed to employ such lawyers as they may select.

There was no communication between Dare and Fosburgh from the second of April until the twelfth of April. On the latter day Fosburgh went to Dare's factory. This is Dare's testimony: "As I was going in the office, I met Mr. Fosburgh coming out. I asked him why he was not at work. He said he was not working; he was going down town. I asked him if he would call at the store and get the amount due him, or if I would bring it to the factory for him. He said he guessed not; that the time had passed at which he should receive his royalty, and that the contract was no longer good, and that he did not intend to go to work for me again. I told him it made no difference about his working; that the contract was another thing, and was as good as it ever was; that it was his fault that he did not have his money, not mine; that I had given him notice that it was ready for him; that my time and attention had been so much occupied that I had not thought to bring it to him. He then started to go out of the office, and I again asked him if he would not call at the store and get the amount due him. He said that he didn't know that he would; that he had taken legal advice, and that they told him that the agreement was no longer in force." The same evening Dare tendered to Fosburgh \$45.25, and an account, sworn to that day, of articles made and sold under said agreement, from January 7th to April 1st. As a memorandum of what transpired, the parties then signed this written statement on the back of the account: "He refuses to accept it to-night, 11 P. M., April 12, '78; does not say or will not say what he will do to-morrow." The next morning the parties met again, and Dare renewed the tender, but Fosburgh declined to accept the money. On the fifteenth of April, Dare sent to Fosburgh a letter, which he received either that day or the next day, saying: "The amount of royalty due you to 1st inst., (\$45.25,) of which I advised you on the 2d inst.,

and tendered you, together with sworn statement, on the 12th inst., is here at my office, subject to your order. Please call and receive the same." Nothing further transpired between Dare and Fosburgh until the latter part of June, 1878, when Fosburgh called on Dare and informed him that he, Fosburgh, had made an agreement with the defendant and Butler, and stated that he did not think they would ever do much with the article. Dare asked him if he would receive the amount due from him for April, and the amount due for July. He said he would see Dare in a day or two. A day or two afterwards Dare tendered to him the statements for April and July, and the amount due therefor. He read the statement, and said he would call on Dare on July 8th. He did so, and then received the two statements and the two amounts, \$45.25 and \$283.75. This suit was brought in September, 1878. Fosburgh accepted his royalties from Dare due in October, 1878, and January and April, 1879. The agreement of Fosburgh with the defendant and Butler was not recorded in the patent-office until November 4, 1878. It does not appear that Dare saw it or a copy of it, or knew its contents, until after this suit was brought.

The defendant contends that the failure of Dare to render a statement and make a payment on the first day of April, or within ten days thereafter, worked, *ipso facto*, a forfeiture of his rights under the agreement, by its terms.

It is quite clear that the first statement and the first payment became due on the first day of April, and that the position taken on the part of the plaintiff, that no statement and no payment became due until the end of the first full quarter year named in the agreement, namely, until July 1st, is not a sound one.

This is not a contest between Fosburgh and Dare. Fosburgh is willing that the agreement between him and Dare should be regarded as existing. He has recognized its continuing existence. He never forbade Dare from making articles under the patent, and never took any legal proceedings to enjoin him from doing so. Nor did Boylston and Butler. Boylston and Butler paid Fosburgh no consideration

in gross for the license to them. It does not appear that Boylston will not be in the same position, if excluded from operating under that license, that he was in before he received it. Fosburgh has accepted no royalties from him, and it does not appear that he claims any. By his conduct, Fosburgh has repudiated the validity of his license to Boylston and Butler, and, as against them, could not be heard to assert its validity. Boylston had full notice of the existence of the agreement with Dare before he took his license, and an inquiry of Dare would have shown at once that Dare did not admit that the agreement between him and Fosburgh was at an end. All the equities of the case are with the plaintiff and against the defendant. The evidence shows that Dare never had any intention of not paying Fosburgh, and that he was able and willing to do so. Under all these circumstances, if Boylston was suing Dare in equity for infringement, the court would regard the license to Dare as in full force. The same result must be reached in this suit. It does not appear that the time specified was of the essence of the contract. The provision as to the becoming void of the license was a security for the payment of royalties, and a court of equity would declare the license at an end, in a proper case, just as it will refuse to declare it at an end in a case where it would be inequitable to do so. It does not appear that the failure of Dare to actually tender the statement and money to Fosburgh before the twelfth of April operated in any manner as an injury to Fosburgh.

The foregoing remarks are made on the view that it was incumbent on Dare to seek out Fosburgh within the ten days from April 1st, and tender him the money and the statement. The agreement was a peculiar one. There would be sixty-six payments and accounts to be made during the life of the patent. No place was specified where they were to be made. It was an accident that Fosburgh happened to go into Dare's employ. The parties had given no practical construction to the contract, so as it made it reasonable for both to understand that a given way of making payment had been agreed on. Under all the circumstances in evidence it must be held,

that, after what passed between Dare and Fosburgh on the second of April, even if it be taken as Fosburgh states it, it was the duty of Fosburgh to apply to Dare for an account and a payment, and that he had no right to declare the agreement void, and to proceed to make the license to Boylston and Butler without the assent of Dare. As he did not apply to Dare, and as Dare made a complete tender to him before he made the license to Boylston and Butler, it must be held that Dare lost none of his rights, and that the defendant acquired no rights under the patent, he having taken with notice of the agreement to Dare, which notice was notice of all he might have learned by inquiry of Dare.

The defendant takes the point that the invention patented is not useful. There is sufficient utility in it to support a patent. All that the evidence amounts to is that the article is better with an added improvement. Moreover, no such defence is set up in the answer.

There must be a decree for the plaintiff for a perpetual injunction, and an accounts of profits and damages, with costs.

WARING v. JOHNSON.

(Circuit Court, S. D. New York. February 4, 1881.)

1. RE-ISSUE No. 8,199—IMPROVEMENT IN POCKET CHECK-BOOKS—NOVELTY.

Re-issued letters patent No. 8,199, for an "improvement in pocket check-books," contained, *inter alia*, the following claim: "(1) The combination in a check-book of checks and stub pieces of substantially the same size, so united that two checks lie between every two stub pieces, substantially as specified and set forth." *Held*, that such claim was not void for want of novelty.

2. SAME—PATENT No. 191,436—IMPROVEMENT IN BANK CHECK-BOOKS—INFRINGEMENT.

Held, further, that such claim was infringed by bank check-books made in accordance with the description and drawings in patent No. 191,436, for an "improvement in bank check-books."—[Ed.]

Charles F. Blake, for plaintiff.

William H. King, for defendant.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent No. 8,199, granted to the plaintiff April 23, 1878, for an "improvement in pocket check-books;" the original patent No. 183,347 having been granted to James R. Osgood, as assignee, on the invention of said plaintiff, October 17, 1876. The specification of the re-issue, reading what is outside of brackets and what is inside of brackets, leaving out what is in italics, says: "Figure 1 represents a face view; Figure 2, perspective, showing manner of folding; Figure 3, face view of another mode of making my invention; Figure 4, perspective of same. Like letters indicate like parts in all the [drawings] *figures*. The object of my invention is to provide a pocket check-book which shall at once be convenient to carry in the pocket, and which shall at the same time be provided with suitable stubs having sufficient surface to enable the user to keep the record of his checks drawn, and of his deposits. Prior to my invention pocket check-books were made having the stub at the rear end of the check, from which the check was torn when used. Such check-books were found, in practice, to be too long to be carried in the pocket. Other check-books had the stubs extending all along the tops of the checks; but such books were too broad, and the stubs were of an inconvenient and unusual form. My invention avoids all of these difficulties, and consists in so constructing the check-book that it shall be not materially longer or broader than the check itself, while at the same time it provides stubs of the size and form used in ordinary office check-books. In my check-book, the stubs, *AA*, are of about the usual size, and are provided at their rear end with a lip or binding piece, *bb*, to bind them firmly into the back of the book. The checks, *cc*, are attached to them, not at their front, but at the top and bottom, at the line, *dd*, so that the stubs extend from the bound back nearly the whole length of the check, and between them. The two stubs are formed of one piece of paper, the second one following the first in the length of the book. They are of about the size of those in any

ordinary check-book, and afford the usual facilities for recording the checks and for keeping a deposit account. The top check is folded down over the face of the stub, and the bottom check is folded up behind it, so that, when both checks are folded in, they and their stubs are completely protected by the cover. Any convenient number of these checks may thus be bound up, and the book, when complete, is about the length and breadth of an ordinary check, and remains of uniform shape as the checks are removed. Another mode of practicing my invention is to take a piece of paper three times the length of the desired check. This paper is then divided by folding into three equal parts. The middle section, *e*, [may be] is divided by [a line] *lines*, *ff*, into two stubs. Over these stubs, and at their ends, the end divisions, *gg*, of the paper are folded, which ends constitute two checks. The paper thus folded has at its top a lip of paper, *h*, nearly as long as the length of the two stubs or middle section, and of sufficient width for binding purposes. These may be bound together in convenient number, and constitute a check-book of the size of an ordinary check." The re-issue contains two claims, as follows: "(1) The combination, in a check-book, of checks and stub pieces of substantially the same size, so united that two checks lie between every two stub pieces, substantially as specified and set forth. (2) A check-book in which the checks are folded in upon the stub piece, which lies between the checks, and which is alone attached to the back of the book."

Taking what is above cited from the text of the specification of the re-issue, and reading what is outside of brackets, and what is in italics, and omitting what is inside of brackets, we have the text of the specification of the original patent. The original patent had but one claim, which was in the same words as claim 2 of the re-issue. The drawings in the original and the re-issue are identical with each other. It is plain that the descriptions in the two specifications are the same, and that the only difference between the original patent and the re-issue consists in adding in the re-issue claim 1 therein. It is also plain that the drawings and

descriptions in the original show that the checks and the stub pieces are of substantially the same size, and that two checks lie between every two stub pieces, in both of the modes set forth for practicing the plaintiff's invention.

It is not claimed that the defendant has infringed the second claim of the re-issue, but it is alleged that he has infringed the first claim of the re-issue. The answer avers that the defendant has made and sold bank check-books under and by virtue of letters patent No. 191,436, granted to him May 29, 1877, for an "improvement in bank check-books," and that he believes such making and selling are the acts of which the bill complains. The plaintiff proves the sale by the defendant of five check-books, one of which is produced, and which, it is clear, is made according to the description and drawings in patent No. 191,436. According to such description and drawings, and from the check-book so produced, it is manifest that in the defendant's check-book there is a combination of checks and stub pieces of substantially the same size, and that two checks lie between every two stub pieces. The defendant's check-book is composed of a series of leaves, each printed on one side, to form a blank bank-check, and of another series of leaves, each printed on both sides, to form stub leaves on which to keep a record of each check, and of bank deposits and bank balances. Between every two stub leaves are two check leaves, the check leaves and the stub leaves being of the same size, bound together at the left hand, and each check-leaf perforated by a line of cross perforations near the place of confinement at the left, to enable the check to be readily severed. When the first check leaf at the right is filled out, the transaction is recorded on the adjoining face of the stub leaf at the left of it; and when the next succeeding check leaf at the right is filled out, the transaction is recorded on the adjoining face of the stub leaf at the right of that check leaf. Each face of a stub leaf has on it a place to record the particulars of the check belonging to it, and also by the side of such place a place to keep an account of bank deposits and of the bank balance, the former place being always nearer

the back binding than the latter place. Thus each stub leaf is utilized on both sides, and for every two checks there is an additional piece of paper of the size of each of such checks, and the whole book is no larger in superficies than the size of the check, plus back margin enough to bind with. The back of one check adjoins one face of the succeeding stub leaf, and the other face of that stub leaf adjoins the front face of the succeeding check, and the back of the next check adjoins one face of the stub leaf succeeding it, and so on. The checks not torn out, and the stub leaves, are thus always in position to be written on, inside of the dimensions of the book, without any movement at all of any check leaf, and without any movement of any stub leaf in any direction, except to the left or right, towards or from the place of binding, like turning the leaves of any ordinary bound book. Following the description in the plaintiff's re-issued specification, the defendant's book is convenient to carry in the pocket, and is provided with suitable stubs having sufficient surface to enable the user to keep the record of his checks drawn, and of his deposits. It is not materially longer or broader than the check itself. It provides stubs of the size and form used in ordinary office check-books, each place on a stub leaf for recording the particulars of a check being of about the usual size in an ordinary check-book. Each stub leaf can be bound at its left-hand margin. The stub leaves extend to the right from the bound back the whole length of the checks, there being one stub leaf between every two checks and the next succeeding two checks, and two checks between every stub piece and the next succeeding stub piece. The two places on a stub leaf for recording the particulars of checks are on one piece of paper. The checks and stub leaves are completely protected by the cover; and the book is about the length and breadth of an ordinary check, and remains of uniform shape as the checks are removed.

The differences in construction between the book first described in the plaintiff's re-issued specification and the defendant's book are that in the defendant's book the two checks are not attached to their stub leaf, one at the top and one at

the bottom of such stub leaf, with perforations between the check and the stub leaf for detachment of the check; and the place of recording the particulars of the second one of every two checks is not on the same place of the stub leaf with the place for recording the particulars of the first one of such two checks, and the former does not follow the latter in the length of the book. In the plaintiff's book the mode of attaching two checks to a stub leaf makes necessary a fold between each check and its stub leaf, one fold up and one fold down, there being no attachment of the check to the book except through such attachment of it to the stub leaf. As two checks lie folded, so attached, the place for recording the particulars of each one of such two checks is on the adjoining face of the stub leaf at the left, there being two such places on that face, one at the left for one check and one at the right for the other check. On the other face of such stub leaf is printed a place for recording bank deposits and bank balances, there being nothing else on that face. Until both of any two checks are torn out, that face of the stub leaf succeeding them is inaccessible for use except by folding out from the dimensions of the book the superimposed check or checks. The plaintiff's specification does not state where the record of deposits is to be kept, except that it is to be on a part of the surface of the stub leaf, nor do the drawings show; but as the whole of the surface of one face of the stub leaf is described and shown as divided into two places for recording the particulars of two checks, and as there is one of such pieces for every two checks, and as nothing else is described or shown as occupying any part of the surface of the other face of the stub leaf, and as the description states that the stub leaves afford the usual facilities for recording the checks and for keeping a deposit account, it necessarily follows that the deposit account is to be kept on that face of the stub leaf on which the particulars of the checks are not recorded. Referring to the particulars before stated as existing in the defendant's book, the plaintiff's book is composed of a series of leaves, each printed on one side, to form a blank bank check; and another series of leaves, each printed on both sides, to form stub leaves on which to keep

a record of each check, and of bank deposits and bank balances. Between each two stub leaves are two check leaves, the check leaves and the stub leaves being of substantially the same size, the stub leaves bound together at the left hand; two check leaves being attached to each stub leaf, one at its top and one at its bottom, there being longitudinally, the whole length of each place of attachment, a line of perforations to enable the check to be readily severed. The two checks are folded into the dimensions of the book, the one down and the other up, at the two lines of perforations, bringing their faces uppermost; the check faces being printed on the same side with that face of the stub leaf on which the particulars of the checks are to be recorded. Where the first check leaf at the right is filled out, the transaction is recorded on the adjoining face of the stub leaf at the left of it; and where the next succeeding check leaf at the right is filled out, the transaction is recorded on the same face of that stub leaf. One face of each stub leaf has on it two places to record particulars of checks, and nothing else, and the place to keep an account of bank deposits and bank balances is either on that face of the stub leaf at the left of every two checks which has not on it the places for recording the particulars of checks, or on the next adjoining face of the stub leaf at the right of such two checks. Thus each stub leaf is utilized on both sides, and for every two checks there is one additional piece of paper, of substantially the same size as each of such checks, and the whole book is no longer in superficies than the size of the check, plus sufficient back margin on the stub leaves to bind with. The back of one check adjoins one face of the succeeding stub leaf, and the other face of that stub leaf adjoins the front face of the succeeding check, and the back of the next check adjoins one face of the stub leaf succeeding it, and so on. If the record of bank deposits and bank balances for any two checks is kept on the other face of the same stub leaf, on one face of which the particulars of said two checks are recorded, which is the obvious method, the checks not torn out, and the stub leaves, are always in position to be written on, inside of the dimensions of the book, without any

movement at all of any check leaf, and without any movement of any stub leaf in any direction, except to the left or right towards or from the place of binding, like turning the leaves of any ordinary bound book.

On the question of infringement the first question is as to the proper construction of the first claim of the plaintiff's re-issue. On this subject, as well as on the question of novelty, several alleged prior inventions are introduced. These are, English provisional specification for order books No. 2,918, filed December 21, 1858, by Nicholas Dawson; English provisional specification for arranging manifold letter books No. 1,992, filed September 1, 1859, by James Brine; English provisional specification No. 1,109, for counterslip note-book, filed May 3, 1864, by Bradly and Fielding; United States patent No. 170,686, granted December 7, 1875, to Ben. Morse, for "an improvement in tickets;" United States patent No. 171,429, granted December 21, 1875, to John M. Savin, for "an improvement in tickets;" and the structures represented by Exhibits C and D, testified to by Joseph H. Mann. Savin's patent need not be considered, as the application for the plaintiff's original patent was filed May 6, 1875, and that for Savin's patent was filed November 4, 1875. In no one of the other prior structures referred to is there shown any check-book in which two checks were interposed between every two stub leaves or record sheets, or in which the check and stub leaves were of substantially the same size, or in which there were two checks between every two stub leaves, or only one stub leaf for every two checks, or less than one stub leaf for every check. These are distinguishing features of the plaintiff's book and of the defendant's book. Dawson's specification shows alternate leaves perforated to be detached, and alternate leaves bound to remain, leaf for leaf; the leaves to remain being used for copies of matter written on the detachable leaves, either by making the detachable leaves of metallized paper, or interposing, while writing, carbonized paper between the two leaves. Brine's specification shows alternate leaves of prepared copying paper and of ordinary writing paper, the latter being perfo-

rated to be detachable, and the former bound to remain; the act of writing on the copying paper, with a sheet of carbonized paper put between it and the ordinary paper, causing a copy of what is thus written to be made on the ordinary paper. The specification of Bradly and Fielding shows a leaf with a printed bill-head perforated at the left, close to the binding, and next a perforated leaf a short distance from the binding, so as to leave, when torn out, a stub or counterslip between the perforation and the binding. A piece of black paper is interposed between the first and second leaves, and the first is written on, making a copy on the second, and a memorandum is made on the stub, and the two leaves are detached. In regard to the Morse specification, it is sufficient to say that the leaves in it are not shown as necessarily of substantially the same length, and there is only one ticket between any two record sheets.

In Exhibit C of claim, the stub leaf is only one-half the length of the check, and there is but one stub leaf for each check. A book made of them, whether partially used or not, showed stub leaves of not substantially the same length as the check leaves. Exhibit D shows nothing different from Exhibit C.

It was not new at the date of the plaintiff's invention, as shown by the foregoing matters, to make books containing leaves, which, when filled up, were to be detached, and other leaves for recording the contents of the first leaves, which other leaves were to remain in the books. Nor was it new at that date to make such books not larger, substantially, in either direction than the size of the leaves to be detached, and with the leaves to remain as large in size as the leaves to be detached. Nor was it new to make check-books with stub leaves, one stub leaf interposed between two checks, and one check between two stub leaves, and the book no larger substantially than the check. But these things do not meet the first claim of the plaintiff's re-issue, nor do they meet the features found in the defendant's book which enter into said first claim, as those features are hereinbefore set forth.

It is suggested on the part of the defendant that the first

claim of the plaintiff's re-issue is identical with the second, for the reason that the word "combination," and the words, "so united," in the first claim, can have reference solely to the mode described in the specification of uniting the two checks and the stub leaf by making them in one piece, and folding the checks in on the stub leaf in the center, the stub leaf alone being attached to the back of the book. This view is not tenable. The only object of any union between the check leaves and the stub leaves is to retain the check leaves as integral parts of the book until they are detached. Until such detachment the combination and the union exist. Such union and combination in both the plaintiff's book and the defendant's book take place at the perforated lines; and it makes no difference whether the perforation between the check and the stub leaf is at the top or bottom of the stub leaf, or at the left end of the check. In either case the characteristic features of the plaintiff's book, embodied in the first claim of the re-issue, result in view of the state of the art before set forth. If the defendant's book had been described and shown in a patent granted to him when the plaintiff's original patent was granted, and if afterwards the plaintiff's book had appeared, the latter would, in view of the state of the art before set forth, have infringed a claim in that patent, worded as is the first claim in the plaintiff's re-issue. Under the foregoing views as to the proper construction of the first claim of the plaintiff's re-issue, it does not relieve the defendant from infringement that in his book the checks are not printed on the same sheet with the stub leaf, and are not folded over at the perforations, and that the top and bottom of the stub leaves are not attached to the checks.

It results from the foregoing views that the charge of infringement is made out, and that neither what is claimed in the first claim of the plaintiff's re-issue, nor what is found in the defendant's book as infringing that claim, is shown to have existed prior to the plaintiff's invention.

The answer sets up as a defence that the specification and claim of the plaintiff's re-issue cover a larger improvement

than was previously included in his original patent. If this means only that the claim of the re-issue is broader than the claim of the original, it amounts to nothing. If it means, in the language of the statute, that the re-issue is not "for the same invention," as those words are interpreted, the defence cannot prevail.

No other defence set up in the answer is proved. No defence of abandonment is set up. All the views presented on the [part of the defendant have been considered, and there must be a decree for the plaintiff for an account of profits, and an ascertainment of damages and a perpetual injunction, with costs.

STROBRIDGE v. LINDSAY, STERRITT & Co.

(Circuit Court, W. D. Pennsylvania. March 28, 1881.)

1. INFRINGEMENT—DIVISION OF DEVICE.

A patent cannot be defeated by dividing a patented device into two parts, which, when combined, produce the same result in substantially the same way.

Wheeler v. Clipper Mower & Reaper Co. 6 Fish. 2.

2. SAME—RE-ISSUE No. 7,583.

Re-issue No. 7,583, for an improvement in coffee-mills, *held*, infringed.

Strobridge v. Lindsay, Sterritt & Co. 2 FED. REP. 692.—[Ed.]

In Equity. Sur rule for an attachment against defendants for contempt.

Takewell & Kerr, for rule.

B. F. Thurston and *Geo. H. Christy*, for defendants.

ACHESON, D. J. In this case, the court, upon final hearing, held that the coffee-mill complained of, manufactured by Landers, Frary & Clark, and sold by the defendants, infringed the first claim of the plaintiff's re-issued patent, viz.: "A coffee or similar mill, having a detachable hopper and grinding-shell formed in a single piece and suspended within the

box by the upper part of the hopper, or a flange thereon, substantially as and for the purpose specified."* Accordingly, on May 31, 1880, a writ of injunction was issued against the defendants and duly served upon them. The case is now before the court on a rule granted upon the defendants to show cause why an attachment should not issue against them for violating the injunction. From the affidavits now submitted it appears that after the opinion of the court was filed the defendants returned to Landers, Frary & Clark all the coffee-mills they had on hand, of the pattern complained of, and afterwards received in exchange from the manufacturers other coffee-mills, constructed like the exhibit now produced, and designated the "Lloyd coffee-mill." These latter mills the defendants have sold and are now selling.

The plaintiff complains that these mills embody his invention equally with those formerly sold by the defendants. This is denied by the defendants, who allege that the "Lloyd coffee-mill" differs essentially from those mills in that it does not have a detachable hopper and grinding-shell formed in a single piece, but, on the contrary, that the hopper and grinding-shell thereof are separate constructions. It is certainly true that in the "Lloyd coffee-mill" the hopper and grinding-shell are cast separately, but they are mechanically attached together before they are suspended within the box. This union is thus effected: The hopper is provided with two wire pins cast in it, one on each side of the lower opening, and the lower end of the hopper has an annular shoulder around it, against which the grinding-shell is placed. The grinding-shell has a lug on each side, corresponding in location with the pins of the hopper, with holes for their reception. The hopper and grinding-shell are securely and firmly united by inserting the annular flange of the latter into the lower end of the hopper, and the pins of the hopper into the holes in the lugs of the grinding-shell, and then bending the pins sidewise.

Why, since the injunction was granted, have Landers,

*See 2 FED. REP. 692.

Frery & Clark made the above-described change in their coffee-mills? It cannot be shown, and, indeed, it is not pretended, that the change is an improvement to the mill, or that thereby the cost of manufacture is lessened, or any other advantage is gained or useful purpose subserved. Manifestly the sole object is to produce a mill of which it can be affirmed that the hopper and grinding-shell are not cast integral, or formed in a single piece literally. But "the letter killeth;" and if the justice of the case is not to be sacrificed, regard must be had to the spirit rather than the phraseology of Strobridge's first claim. Truly the plaintiff's success was a barren victory, if by such an alteration as the one here adopted the injunction of this court can be evaded. But the expedient must fail of its purpose. The change is but colorable. Although cast in two pieces, yet when put together *for use* the hopper and grinding-shell are substantially and for all practicable purposes "formed in a single piece."

If authority is needed for the proposition that a patent cannot be defeated by dividing the patented device into two parts, which, when combined, produce the same result in substantially the same way, it will be found in *Wheeler v. Clipper Mower & Reaper Co.* 6 Fisher, 2.

The affidavits on the part of the defendants, filed in answer to this rule, so often refer to the "French mill," that I have again given it the best and most careful examination and study of which I am capable. The result is that I am not only confirmed in the opinion that that mill did not anticipate Strobridge's invention, but I am satisfied that it is not the prototype of the "Lloyd coffee-mill."

The following clear and, I think, exact statement in respect to the "French mill" occurs in the affidavit of Mr. Reese, the plaintiff's expert witness. He says: "In the 'French mill' the grinding-shell is not united or fastened in any way to the hopper; but, on the contrary, it is a loose and detached piece, which is held in its place and relation to the hopper by a metallic strap or step, bent to the shape of, and extending across and below, the said shell, and fastened

to the bottom of the hopper at the sides of the grinding-shell by wood screws. In the sides of the loose grinding-shell are grooves or scores, and the step passing through these grooves keeps the shell from turning with the grinding-nut. The step is provided with a central hole or socket, in which the lower end of the grinding-shaft is placed. The grinding-shaft is supported by the cover above, and supports the grinding-shell, and hence the purpose of the step is not to support it, but to take the circular and lateral thrust or strain off the grinding-shell."

There exists, then, in the French mill a combination of three distinct and indispensable pieces, viz., the hopper, the grinding-shell, and the metallic strap or step. The latter is an essential element of the combination. Remove it and there remain a suspended hopper and grinding-shell, but the mill is inoperative. Now, Strobridge dispensed with the metallic strap or step, and for the first time in the history of the art produced an operative coffee-mill having a detachable hopper and grinding-shell formed in a single piece, and suspended within the box by the upper part of the hopper, or a flange thereon.

In my judgment the Lloyd coffee-mill infringes the first claim of the plaintiff's patent equally with the mill previously manufactured by Landers, Frary & Clark, and sold by the defendants.

I am, however, satisfied from the affidavits of the defendants that hitherto they have acted in good faith to the court, and are not in wilful contempt. Therefore, the present rule for an attachment will not be enforced. The rule is discharged for the reason just assigned, but it is ordered that the defendants pay the costs of the rule and proceedings thereon.

BATE REFRIGERATING Co. v. TOFFEY and others.

(Circuit Court, D. New Jersey. January 19, 1881.)

1. RE-ISSUE NO. 7,643—IMPROVEMENTS IN AIR COOLING AND DISTRIBUTING APPARATUS—NOVELTY.

Re-issued letters patent No. 7,643, for "improvements in air cooling and distributing apparatus," claimed, *inter alia*: "In an air cooler, or apparatus for cooling carcasses, etc., the combination of a fan-blower, or its equivalent, an ice-chest, or equivalent, and one or more pipes or conduits, which equally distribute the air within the place or apartment to be cooled, substantially as and for the purpose set forth." *Held*, from a consideration of the state of the art at the time of the invention, and from the specifications and claims of the patent itself, that its precise design was to cool apartments; that the same was fairly applicable to enclosures constructed for the transportation of meat, and that a new and useful result was thereby reached.

—[Ed.]

In Equity.

Dickerson & Dickerson, for complainant.

George Gifford, for defendants.

NIXON, D. J. The complainant corporation files its bill of complaint against the defendants for infringing certain re-issued letters patent No. 7,643, dated April 24, 1877, for "improvements in air-cooling and distributing apparatus." The original letters patent, numbered 44,731, and dated October, 1864, were granted to one Moses J. Kelley, for an "improved atmosphere cooler." One of the defences set up in the answer was that the re-issue was not for the same invention. It was not urged at the hearing, and, on comparison of the two letters patent, I find no valid grounds for such a defence.

The subject-matter of the controversy has reference to one of the most valuable inventions of modern times; to-wit, the method of transmitting slaughtered animals for long distances over oceans and continents, and preserving, at the same time, the sweetness and purity of the meat as an article of human food. Whilst a beneficent Providence has furnished to the world an abundant supply of everything needful for the material wants of all His creatures, He has left it

to the ingenuity of man to devise the means of supplying the destitutions of one region with the surplus of another. All contrivances which have for their object such a result are worthy of the most careful consideration. It is contended, on the part of the complainant, that the defendants have infringed the first, second, third, and fifth claims of the Kelley re-issue. These claims are as follows: "(1) In an air-cooler, or apparatus for cooling carcasses, etc., the combination of a fan-blower, or its equivalent, an ice-chest, or equivalent, and one or more pipes or conduits, which equally distribute the air within the place or apartment to be cooled, substantially as and for the purpose herein set forth; (2) in an air-cooler, or apparatus for cooling carcasses, etc., the combination with the ice-chest of one or more perforated distributing or equalizing tubes or conduits, substantially as and for the purpose herein set forth; (3) in an air-cooler, or apparatus for cooling carcasses by a forced current of air, etc., the ice-chest having an oblong opening at or near its bottom, and extending nearly or quite across the width of the ice-chest, substantially as represented in figure 1, for the purpose specified; (5) in an air-cooler, or apparatus for cooling carcasses, etc., the combination of the fan-blower, or fanners, F, the system of tubes T, t', t', etc., and the ice-chest or depository, in either of said forms, as and for the purpose shown and represented."

The main defences on which the defendants seem to rely, are (1) that Kelley was not the original and first inventor of the alleged improvements; (2) that the refrigerator which they use is not an infringement of the re-issued letters patent of the complainant.

1. The question of novelty is determined by ascertaining the proper construction of the patent alleged to be infringed. If it be construed broadly as a combination of an ice-chest, a fan-blower, and one or more pipes or conduits, without reference to the performance of any specific functions, then the patent has been anticipated by other refrigerators,—notably, by the Lyman 1853 apparatus. But if, as the claims and specifications seem to admit, it be limited to a combina-

tion of these instrumentalities, whereby an equable distribution of the air shall be produced within a place or apartment to be cooled, a new and useful result has been reached, which distinguishes the apparatus of the complainant from any organization previously existing.

But the counsel for the defendants insists that no authority is found in the patent to place the combination within an enclosure; that the same is necessary to make the apparatus operative; and that doing so was an afterthought by the complainant, although not contemplated or provided for by the original inventor.

It appears evident, however, from a consideration of the state of the art at the time of the invention, and from the specifications and claims of the patent itself, that its precise design was to cool apartments, and that it is fairly applicable to enclosures constructed for the transportation of meats.

The first and principal claim is for a specified combination of elements "which equably distribute the air within the place or apartment to be cooled." It is possible that the patentee thought it was capable of being used outside of an enclosure; but, whether this be so or not, there is enough revealed in the specifications and claims to suggest to any one skilled in the art to organize the mechanisms within an apartment or closed room, where, doubtless, the best results are attainable. The phrase, "*which equably distribute the air within the place or apartment to be cooled,*" are the emphatic words of this claim. They give individuality and life to the patent. They not only suggest an enclosure in which the combination is to be placed, but they indicate a beneficent result to grow out of the apparatus as arranged by the patentee, which gives character to it, and which distinguishes it from all others.

The remaining claims are modifications of the first. The second is limited to one or more pipes, each provided with several perforations, and arranged, as in the first claim, so as to obtain an equable distribution of the cooled air throughout the apartment. The third is for the form of the ice-chest, as described, to-wit, with an oblong opening extending nearly or

quite across its bottom, by means of which the air entering the ice-box is equably distributed. There is a special limitation of the fifth claim to the system or aggregation of tubes as shown in the drawings; that is to say, one main tube, T, and the several smaller ones, *t t*, etc., extending over the ceiling of the chill room.

Thus interpreting the several claims of the complainant's patent, alleged to be infringed, the only remaining inquiry is whether the defendant's apparatus infringes them. With the above construction of their meaning it seems unnecessary to dwell long upon the question. Not much attention was given to it in the evidence or on the argument, the whole controversy there appearing to turn upon the question of novelty. It was not seriously controverted that the refrigerators used by the defendants secured an equable distribution of the air throughout the place or apartment to be cooled, by substantially the means indicated in the complainant's patent.

There must be a decree for the complainant corporation, against the defendants, for infringing the first, second, third, and fifth claims of the patent sued on.

THE BARK CLEONE.

(*District Court, D. California.* March 10, 1881.)

1. SALVAGE—DERELICT—COMPENSATION.

If a vessel be found, though with no one on board, under such circumstances that the persons assuming to be salvors knew, or ought to have known, that their services were not desired, and they take possession with intent to supplant the master and owners in giving her relief, they have no claim for compensation.

2. SAME—SAME—POSSESSION.

Unless a vessel has been utterly abandoned, and is, in contemplation of law, a *derelict*, even *bona fide* salvors have no right to the exclusive possession, and are bound to give up charge to the master on his appearing and claiming charge.

3. SAME—SAME—SAME.

A stranded vessel, laden with a valuable cargo, was left but not abandoned by the master, having been placed in charge of an agent

until he could return in another vessel to recover both the cargo and wreck. *Held*, that such vessel and cargo could not be taken possession of by a stranger, who was fully advised of these facts, and knew that the master was then on his way in another vessel to take possession.

4. SAME—SAME—COMPENSATION.

Held, further, that the mere fact of placing a man on board, with the object of anticipating and supplanting the master, would not entitle such stranger to a share of the property, which was subsequently recovered by the unaided efforts of the master.—[Ed.]

Libel for Salvage Compensation.

Geo. B. Merrill, proctor for libellant.

Milton Andros, proctor for respondent and claimants.

HOFFMAN, D. J. On the fifteenth of October, 1879, the bark *Cleone*, which had just completed a successful whaling voyage in the Arctic ocean, came to anchor in St. Lawrence bay, near the northerly entrance to Behring's straits. On the 19th her chains parted in a gale of wind, and a short time afterwards she was driven ashore on a sandy beach in the north-east part of the harbor, where she bilged and filled with water. After the gale subsided she lay on her starboard side, "very still and quiet," in 12 feet of water. The season was far advanced, and Captain Nye, the master, at once set about transferring such portion of the cargo and outfit as was accessible to the *Helen Mar*, which was then lying in the harbor. He put on board the latter vessel the whalebone he had obtained, provisions, articles of clothing, furniture, etc., etc. He left on board the *Cleone* 115 barrels sperm oil, 1,300 barrels whale oil, blubber, and some materials, shooks, casks, etc. He finally quitted the ship with his crew on the twenty-second of October. It was of course impossible for any of his crew to encounter the rigors and darkness of an Arctic winter in a stranded vessel filled with ice. The master therefore made the best arrangement for the care and preservation of his property that was practicable by placing it in charge of a native chief, whose fidelity he endeavored to secure by liberal presents, and by promises of further reward if on his return in the ensuing season he should find the vessel and cargo undisturbed. He gave to the chief and his wives a quantity

of cloth, dishes, and articles from the pantry, four kegs of powder, some shot, caps, and cartridges, and a fowling piece. Captain Nye also delivered to the native chief a letter or notice, stating that the vessel had gone ashore in a heavy gale, and that she had been left in charge of the native, with full power to stop anybody from taking anything belonging to her, and that he expected to return and recover all the effects, both oil and wreck, early in the spring. This notice was signed by Captain Nye, and witnessed by Captain Bauldry, of the bark Helen Mar.

Having thus done everything in his power to provide for the safety of his property, and to retain the constructive possession of it during his absence, Captain Nye left for this port in the Helen Mar, after enjoining upon the native to exhibit the letter to the masters of all vessels which might chance to come into the harbor during the ensuing season, before his own return. He arrived at San Francisco November 18th; but, while still at sea, he wrote to his owners a letter, in which, after giving an account of the wreck, he suggested the necessity of making some arrangement for saving the oil, and expressed the opinion that it could all be saved. This project he seems never to have relinquished. In repeated letters he urged upon his owners its entire feasibility, and he declined other employment unless the wrecking of his vessel was included in it. He even announced his determination to undertake the service himself, at his own charges, if his owners declined the enterprise. After a protracted correspondence a contract was at length entered into between the owners of the Cleone, the underwriters, and the owners of the bark Mount Wollaston, by which Captain Nye was to take command of the latter vessel, and, after making a winter whaling voyage to the coast of Mexico, to proceed as soon as the season opened to St. Lawrence bay, and effect the salvage of the Cleone and her cargo. The share of salvage to be paid to the owners, officers, and crew of the Mount Wollaston was fixed by contract, and assented to by all the parties. The Mount Wollaston sailed from this port December 29th, and, after making a winter cruise to the south,

arrived at St. Lawrence bay June 25, 1878. The ice was just beginning to break up, and for two days he was unable to enter the harbor. He was boarded, however, by the interpreter, who informed him of the visit of Captain Dexter and Captain Ravens, presently to be related, and the next day the chief came on board, bringing with him the letter left with him by Captain Nye. On the third day the Mount Wollaston succeeded in entering the harbor. Captain Nye found the Cleone, to all appearance, precisely as he had left her. On going on board of her he ascertained that her decks had been somewhat cut into, and a small quantity of oil taken from her between decks. This, he was informed by the chief, had been done by Indians from the interior, whose depredations the chief was unable to prevent, except by "a war." The great mass of the oil, however, was intact. It was in the lower hold, embedded in ice from six to eight feet in thickness.

Captain Nye had already been informed by the interpreter that Captain Ravens, of the brig Timandra, had some weeks before put a man on board the Cleone, with a view of taking possession of the property. In response to his hail, this man made his appearance. He proved to be a person named Fagin, second mate of the Timandra. He handed to Captain Nye a letter, which the latter declined to read, but he informed Fagin that he had come to the bay for the express purpose of saving his property which he had left there, and he intended to do so. He invited Fagin to go aboard his vessel. This the latter declined, but went on shore and lived with the natives until the arrival of his own vessel. Captain Nye at once proceeded to carry out the object of his voyage, and had made considerable progress towards its accomplishment, and had entered into a contract with the master of the bark Syren, which came into the harbor on the sixth of July, for the shipment of the oil to New Bedford, when Captain Ravens, of the Timandra, arrived, on the eleventh of July.

The circumstances attending the previous visit of Captain Ravens and Captain Dexter must here be adverted to. Captain Dexter, of the Loleta, arrived at the bay about the second

or third of June. He did not approach nearer than eight or ten miles from the wreck, but knew she was there, having heard of it at Honolulu. The natives also reported that she was safe, and the chief exhibited to him Captain Nye's letter. About a week later the Timandra came in, and the two captains went across the ice some eight or ten miles to the wreck. Captain Ravens seems to have urged Captain Dexter to unite with him in taking possession of the vessel by putting a man on board. But this the latter declined, having had, as he said, some experience in wrecking, and being distrustful of the expediency of the measure. Considerations of fair dealing, and regard for the rights of Captain Nye, whom he knew to be on the way to save his property, seem to have formed no part of his motives, for he suggested to the natives to bring to him all the sperm oil they could transport, and he would purchase it; and he endeavored to buy from them one of the Cleone's boats, offering for it a cask of spirits. But their honesty was proof against even this temptation. Their reply was: "Bye and bye Captain Nye come; he no like it." And yet this witness does not hesitate to swear that the natives are such inveterate thieves and liars that, to use his own elegant expression, "you can't trust them as far as you can throw a bull by the tail." However much they may in general be addicted to habits of pilfering, their conduct shows that in this instance, at least, they knew how to be faithful to a trust.

Captain Dexter's refusal to associate himself with Captain Ravens in the enterprise was not final. He informed the latter that he intended to pursue the business of his voyage, but if on his return to the bay he found Captain Ravens still in charge, he would join him if the latter desired. Captain Ravens, having placed Fagin on board, sailed away on the same day, and was followed by Dexter a day or two afterwards. Ravens returned to the bay once or twice afterwards, and on his last trip found Nye in possession and the salvage partially effected, as has been already related. Shortly after his arrival, he and Captain Nye met on board the Syren. Captain Nye was naturally indignant at what he regarded as

an attempt to steal a march on him. "The natives," he said, "have taken some of it, and now the first white man that comes tries to steal the remainder." Captain Ravens, according to Nye's testimony, made no attempt to justify his proceedings. He declared that he did not wish to have anything to do with his (Nye's) oil or ship, but he was ordered by Mr. Merrill, if he could get to St. Lawrence bay ahead of him, "to go for it, and put a man on board at any rate." Captain Ravens' account of this conversation is somewhat different, but Captain Dexter, who testified on the part of the libellant, swears that Ravens stated to him substantially in the same manner the purport of Mr. Merrill's orders. Captain Ravens denies that Nye's letter to the native chief was shown to him, or that he knew that Nye was on his way to the wreck; but in these denials I can place no confidence. When he first proposed to Dexter to join him in taking possession of the vessel, the latter was at first inclined to assent. On further reflection he thought it inexpedient or unsafe to mix himself up in the matter. He had already been shown Nye's letter to the natives, and he knew that Nye was coming in the Mount Wollaston to reclaim his property. He doubted, therefore, and not unnaturally, whether the attempt to get ahead of him would prove successful. He and Ravens had, he testifies, numerous conversations on the subject. He cannot recollect whether he told Ravens about the letter. "I suppose he was shown it just the same as I was." In this supposition I am inclined to agree with him. But it is inconceivable that, in their long conversations on the subject, Dexter should have failed to communicate to Ravens the substance of the letter that had been shown to him, and the fact that Nye was on his way. If Nye's testimony as to Ravens' statement of his owner's orders be true, the point is beyond dispute; for those orders distinctly contemplate his getting to the bay "ahead of Captain Nye."

Dexter's version of these orders as stated to him by Ravens, though Captain Nye's name is not mentioned, evidently contemplates the same contingency. "Ravens told me that Merrill had instructed him that if he got to St. Lawrence

bay, and had a chance, to take charge of the vessel." Captain Nye testifies that the fact that he had taken command of the Mount Wollaston with the intention of effecting the salvage of the cargo of the Cleone was well known, he thinks, to every ship-master and officer at this port employed in the northern whaling and trading business; and he states that he communicated his intentions to Mr. Coffin, an acquaintance of 15 years' standing, and who was then chief clerk to Mr. Merrill—a statement which Mr. Coffin has not been called to contradict.

On the whole, the evidence, in my judgment, leads unmistakably to the conclusion that Captain Ravens went into St. Lawrence bay with the expectation of there finding the Cleone; that he knew she had been left in charge of a native chief by Captain Nye, and that the latter intended to return to her to recover his property, and was then on his way thither; that when he put a man on board of her it was not with a view of then entering on a salvage service. This was obviously impracticable, as the ice prevented him from getting nearer to her with his own vessel than eight miles. His design was to take possession of the vessel, and to secure some sort of lien or right to take her cargo, to the exclusion of her owner, at a future time, and whenever circumstances and his own convenience might permit.

The presence of Fagin on board contributed in no degree to the security of the vessel and her cargo. During the eight months that she had lain there the depredations of the natives had been insignificant, and even these were by Indians from the interior, and not by those to whose chief the charge of the vessel had been entrusted. The sealing and fishing season had arrived, and the Indians were no longer in want of food, and the oil in the hold, imbedded in ice six or eight feet thick, was practically inaccessible to them. To obtain it Captain Nye was obliged to have recourse to dynamite. It thus appears not only that no part of the property was saved by Captain Ravens, but that nothing was done by him which contributed appreciably to its safety, or enabled Captain Nye to effect the subsequent salvage. It is true that Fagin nailed

a strip of lead on a cask to stop the leak. This could not have been of much service, as the oil was frozen to the consistency of lard, and Captain Nye offered to pay Fagin for his time, and also to make some compensation to Captain Ravens. But these offers were peremptorily rejected by Ravens, who demanded one-half of all the property saved by Captain Nye, or at least of the oil.

The claim of the libellant to a salvage compensation is thus found not to be based on the performance of any salvage service of appreciable value, but on the fact that the *Timandra* succeeded in reaching St. Lawrence bay in advance of the *Mount Wollaston*, and that her master took, or attempted to take, possession of the *Cleone* with a view of securing the property at a later period in the season. This claim, I think, is wholly inadmissible. The *Cleone* was not derelict. Her master had neither abandoned the *spes recuperandi*, nor renounced the *animus revertendi*. On the contrary, his correspondence shows that it was not merely his intention, but his fixed and unalterable determination, to recover his property at the earliest practicable moment, and to the carrying out of this determination all other engagements and employments were subordinated. He not only had not abandoned the *spes recuperandi*, but he felt the utmost confidence in the success of the enterprise, persistently urging upon the owners that the certainty of recovering the oil was far greater than that of procuring a similar amount of oil by the catch of an ordinary whaling voyage in the Arctic ocean, while the risk was far less. Nor was the design of returning to the vessel formed after arriving at San Francisco. At the time of quitting the vessel he adopted every means in his power to retain the constructive possession of her, and to notify all comers that she was in charge of a person selected by him, and that he intended to return and recover his property at the opening of the next season.

Under these circumstances it is impossible to treat the vessel as derelict. As well might the goods or "trade," as they are called, which it appears to be not unusual for vessels to leave in charge of natives, at "stations" in the Arctic ocean,

to await their return in the ensuing season, be pronounced derelict and liable to seizure by the first comer. *Tyson v. Prior*, 1 Gal. 133; *The Aquila*, 1 C. Rob. 37-41; *The Bee*, 1 Ware, 336; *The Cosmopolitan*, 6 Notes Cases, (supplement,) 17; *The Barefoot*, 1 Eng. L. & Eq. 661; *The India*, 1 Wm. Rob. 409; *The Lovett Peacock*, 1 Lowell, 143.

The vessel not being derelict, but, on the contrary, in charge of an agent appointed by the master, whose intention to return was known to Captain Ravens, the latter had no right to take, or attempt to take, possession of her.

To entitle a party to salvage, not only must the service rendered be meritorious, but the possession taken must be lawful. *Clarke v. The Brig Healey*, 4 Wash. 656; *The Barefoot*, 1 Eng. L. & Eq. 661.

By quitting the vessel the master and owner does not lose his *jus disponendi* or right of property. If a vessel be found, though with no one on board, under such circumstances that the persons assuming to be salvors knew, or ought to have known, that their services were not desired, and they take possession with intent to supplant the master and owners, in giving her relief, they have no claim for compensation. *The Upnor*, 2 Hag. 8; *The Barefoot*, *ubi supra*; *The India*, 1 W. Rob. 406; *The Amethyst*, Davies R. 23. See argument of counsel (the late Mr. J. Curtis) in *The Island City*, 1 Black, 126; *The Champion*, Br. & Lush. Adm. R. 69.

These authorities establish beyond controversy the principle so agreeable to justice and reason, that unless the vessel has been utterly abandoned, and is, in contemplation of law, a *derelict*, even *bona fide* salvors have no right to the exclusive possession, and are bound to give up charge to the master on his appearing and claiming charge. See *The Champion*, *ubi supra*.

It is not to be tolerated that a stranded vessel with a valuable cargo may be taken possession of by a stranger who knows that she has been left, but not abandoned; that she has been put in charge of an agent of the master, and that the latter intends to return to her, and is actually on his way to her for that purpose; nor that the mere fact of placing a

man on board, with the object of anticipating and supplanting the master, shall entitle him to a share of the property which is subsequently recovered by the unaided efforts of its owner.

The libel must be dismissed, with costs.

THE HERO.*

(District Court, E. D. Pennsylvania. March 23, 1881.)

1. CHARTER-PARTY—OBTAINING SIGNATURE BY FRAUD—BROKER WHEN AGENT OF ONE PARTY ALONE.

F., a ship-broker in New York, sent to H., a ship-broker in Philadelphia, the name of a vessel open to charter in case H. could obtain any proposals. H. obtained an offer from P. W. & Sons, which was accepted. The charter was drawn in P. W. & Sons' office, and marked by the employe in charge of their chartering department with his initials, which, according to a system adopted by P. W. & Sons, and known to H., indicated to P. W. & Sons that the charter was correct and might be signed without further examination. The charter was forwarded to F., who, after altering it by an interlineation, signed it and returned it to H., who left it at the office of P. W. & Sons without mentioning the alteration. P. W. & Sons signed it without noticing the alteration, and sent it to H., but shortly afterwards, discovering the fraud, rescinded the contract. *Held*, that H. was not the agent of P. W. & Sons, but of the ship, and that P. W. & Sons were not liable on their charter-party.

Libel by the master of the bark Hero against Peter Wright & Sons to recover damages for an alleged breach of charter-party. The testimony disclosed the following facts: Funch, Edye & Co., ship-brokers of New York, sent to Hoffman & Meyer, ship-brokers of Philadelphia, the name of the bark Hero (then at Cartagena) as a vessel open to charter in case Hoffman & Meyer could obtain any proposals. Hoffman & Meyer obtained an offer from Peter Wright & Sons, of Philadelphia, which was accepted. The charter was then drawn by a clerk in the employ of Peter Wright & Sons and sub-

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

mitted to W. W. Young, who had charge of their chartering department. It set forth that the bark was "now at Cartagena, and to proceed *promptly* to Philadelphia." Mr. Young examined the charter, and, finding it correct, wrote on it his initials, which, according to the system adopted by Peter Wright & Sons, and known to at least one member of the firm of Hoffman & Meyer, indicated that the charter was in accordance with the previous agreement, and might be signed by the firm without further examination. It was then sent to Hoffman & Meyer, who took it in person to New York. Funch, Edye & Co. objected to the words "proceed promptly," and desired to insert the words "to-wit, in about a fortnight." Hoffman & Meyer objected to this, and returned to Philadelphia without the charter, leaving the matter unsettled. The next day Funch, Edye & Co., having communicated with the master by cable, telegraphed Hoffman & Meyer that the proposed alteration must be made, and requesting them to see Peter Wright & Sons. Hoffman & Meyer, without complying with this request, telegraphed Funch, Edye & Co. that Peter Wright & Sons would cancel the charter if altered, and to send it unchanged. Notwithstanding this, Funch, Edye & Co. interlined the words "to-wit, in about a fortnight," and forwarded the charter thus altered to Hoffman & Meyer. One of the latter firm, with notice of the alteration, took the charter to the office of Peter Wright & Sons, and asked for Mr. Young. The clerk told him that Mr. Young was absent, and asked on what business he called. Upon being told that he had the charter-party of the Hero, the clerk asked him to leave it, which he did without mentioning the alteration. The clerk sent it to one of the firm of Peter Wright & Sons, (Mr. Neall,) who, seeing Mr. Young's initials, and not noticing the alteration, signed it, and it was then returned to Hoffman & Meyer, who forwarded it to Funch, Edye & Co. A few days later, Peter Wright & Sons, upon receiving copies of the charter, discovered the alteration, and notified Funch Edye & Co. that they would not carry out the charter unless the interlined words were erased. This Funch, Edye & Co. refused to do. Upon the arrival of the bark, Peter Wright &

Sons refusing to load her, she was obliged to obtain a charter at a lower rate, and this libel was filed to recover damages.

Edward F. Pugh and Henry Flanders, for libellant.

H. G. Ward and Morton P. Henry, for respondents.

BUTLER, D. J. That fraud was practiced in obtaining the respondents' name to the charter, is clear. Hoffman & Meyer were distinctly informed, while negotiating, that the prompt sailing of the vessel from Cartagena was an essential requisite to the contract. With this in mind, the terms were agreed upon, and reduced to writing, with a clear understanding that the paper should be signed as written. Mr. Young, consequently, with the knowledge of Mr. Hoffman, marked the paper as examined and ready for the respondents' signature. Mr. Hoffman testifies that he understood Mr. Young's mark; that it was a sign the paper had been examined, "so that Mr. Neall, or any other member of the firm, could sign, without reading it through; that the sign was on the paper when it was received, and sent to New York. He further testifies that he and Mr. Meyer objected, earnestly, to the alteration which Funch, Edye & Co. proposed to make; that Funch, Edye & Co. had agreed to sign the charter-party as prepared, without alteration. Hoffman & Meyer telegraphed to Funch, Edye & Co. "Don't alter,—vessel to sail promptly,—as Wrights will surely object to the same." And again, "Wright's insist to have charter to-day. They will cancel charter if you alter it, therefore post at once, unchanged, to avoid trouble." In short, Hoffman & Meyer knew that the paper expressed the definite agreement of the parties, and was to be signed as written; that Peter Wright & Sons would agree to nothing else, but would withdraw from the transaction if any alteration was made; and that when the paper should be returned, with Mr. Young's sign of examination and approval upon it, they would sign it without reading. After the alteration had been fully resolved upon and made, by Funch, Edye & Co., they requested Hoffman & Meyer to communicate with respondents about it; and were answered by Hoffman & Meyer that Mr. Neall had been seen and his consent obtained, "after a short struggle." This answer was wholly untrue.

Not a word was said to Mr. Neall, or any one connected with the respondents, on the subject. The paper was taken to their place by Meyer, without any allusion being made to the alteration, and Mr. Neall, seeing the examination mark of Mr. Young, signed it at once, without reading, as Hoffman & Meyer knew he would. Thus it plainly appears that a fraud was practiced in obtaining the respondents' name, and that Hoffman & Meyer practiced it.

Upon whom should the consequences fall? If Hoffman & Meyer were the respondents' agents, or were not the libellant's, the latter must not suffer for their unfaithfulness. Whom did Hoffman & Meyer represent? Mr. Young, whose duty, as an employe of the respondents, it is to charter vessels, says, "Hoffman & Meyer called and asked for a bid for the 'Hero;'" that "Peter Wright & Sons did not ask Hoffman & Meyer to procure them tonnage;" but that the latter asked the former to make a bid for the vessel, and they did so. Mr. Neall says "the vessel was brought to the attention of Peter Wright & Sons by Hoffman & Meyer, who advised us they had the vessel from Funch, Edye & Co." It is thus rendered quite plain, (for there is no contradiction of this testimony,) that the respondents did not employ Hoffman & Meyer, or regard them as interested in their behalf. Mr. Meyer, who was called as a witness by the libellant, (and would seem to be interested in sustaining the charter,) says "Funch, Edye & Co. gave us, Hoffman & Meyer, the 'Hero' to get a charter-party for, in this city. We then applied to Peter Wright & Sons for an offer, and had several interviews with them, the substance of which we communicated to our principals, Funch, Edye & Co., before an understanding was reached." This corresponds with the testimony of Messrs. Young and Neall, to the extent they go. It reaches further, however, and proves, if believed, not only that they were not the agents of Peter Wright & Sons, but were the agents of the *ship*. The testimony of Meyer is corroborated by the correspondence between Funch, Edye & Co. and Hoffman & Meyer,—the letters and telegrams, most, if not all, of which contain evidence that Hoffman & Meyer represented

the ship, under Funch, Edye & Co. The latter telegraphed the former, during the negotiation, close "Russian bark 'Hero,' now at Cartagena, six shillings and three pence, Cork orders, usual charter," and received for reply, "We cannot get that rate, but can get six shillings, with privilege of continent." August 27th, they wrote to Hoffman & Meyer "We authorize you to close the vessel and expect charter-party in the morning." After receiving the paper and resolving to alter it, they telegraphed, Hoffman & Meyer, "We must insert in 'Hero's' charter, vessel to sail in about fortnight. Please see Wrights at once." On forwarding the paper to Hoffman & Meyer, with the alteration, they expressed the hope that the latter would be able to obtain Wright's assent to the change. Hoffman & Meyer, in communicating the fact that Wright's signature had been obtained, congratulated themselves and Funch, Edye & Co. on their success in the transaction, saying, "We have been very lucky to get this vessel through and charter signed."

These communications, of themselves, would seem to leave no room for doubt that Hoffman & Meyer were acting in behalf of the vessel, alone, and that Funch, Edye & Co., as well as themselves, so understood. The only evidence to the contrary is that found in the testimony of Mr. Volekens, of the firm of Funch, Edye & Co., who says they did not place the vessel with Hoffman & Meyer for charter, but that the latter gentlemen, as agents for Peter Wright & Sons, applied to them to take freight, and that they simply closed with the offers made by Peter Wright & Sons, through such agents. The testimony of this witness (who, no doubt, intends to be entirely fair), shows, in my judgment, a strong bias in favor of the libellant. He seems to be especially on his guard, throughout, against any form of expression or answer, tending to show concert between his firm and Hoffman & Meyer, repeating with unnecessary frequency the idea that Funch, Edye & Co. simply accepted the offer of Hoffman & Meyer as representatives of Peter Wright & Sons. He also seems forgetful of Hoffman & Meyer's remonstrances respecting the alteration of the paper, and their representations of Wright's

unwillingness to allow it; while the correspondence shows how earnest these remonstrances were, and how fully his firm was informed on this subject. I would not say anything disparaging of the witness, personally. I do not doubt his honesty. That he should desire to sustain the charter is quite natural. His firm indicated its views on this subject very clearly when notified of the respondents' repudiation of the paper, and again when conveying this notification to the libellant. I cannot regard the testimony of this witness as sufficient to overcome, or even shake, the case made out on the other side, opposed as it is, not only by what the other witnesses, who speak on the subject, say, but also by the plain import of the correspondence of his own firm with Hoffman & Meyer. I regard it as clear that Hoffman & Meyer had charge of the interests of the ship, alone, in their transaction with Peter Wright & Sons; and that all parties so understood at the time. They are *ship*-brokers, (as distinguished from freight-brokers,) and belong to a class who, as Mr. Neall testifies, ordinarily represent the ship alone; and look to it for compensation. Here the compensation of Hoffman & Meyer comes from the ship; they have no claim, and pretend to none, from the respondents. Their entire duty was to the ship, for which they were bound to obtain the best bargain they could honestly procure. Unfortunately they overstepped the line, and resorted to fraud. The libellant must therefore bear the consequences. A contract thus obtained, through the agency of those to whom the ship was entrusted for charter, cannot be enforced. No question can arise respecting the importance of the change made in the paper. Funch, Edye & Co. pronounced it to be of the highest importance, and it is shown that Peter Wright & Sons viewed it in the same light. But aside from this consideration, a party must be allowed to make his own contract, and cannot be held to one obtained from him through fraud. Whether it is as favorable to him, as one he might have been willing to make, cannot be inquired into.

I have not overlooked the rule, in considering this case, that brokers must sometimes be treated as agents of both

parties,—invoked by the libellant. The doctrine has no application here. Whether it would avail the libellant if it had, need not be considered.

It is much to be regretted that Funch, Edye & Co. did not immediately communicate Peter Wright & Sons' repudiation of the paper, to the libellant, on receiving notice of the fact. The ship had not then sailed, and no serious loss would have resulted, had this been done. The position they assumed,—that their agency closed with the signing of the charter,—rests on a very contracted view of their duty,—the adoption of which they may yet, possibly, have occasion to regret.

The libel must be dismissed, with costs.

THE VESTA.

(*District Court, D. Massachusetts.* February, 1881.)

1. CHARTER-PARTY—GOOD SEA RISK.

A vessel was chartered for the transportation of wheat in bulk under a warranty that she should be tight, staunch, and strong, and in every way fitted for the voyage. *Held*, under the circumstances of this case, that it was essential that the vessel should be a good sea risk for the merchandise specified as cargo.—[Ed.]

Shattuck, Holmes & Monroe, for libellant.

L. S. Dabney, for respondent.

NELSON, D. J. The libellant, being the charterer of the Russian bark *Vesta*, then on her way from Friedland to Delaware breakwater, by a charter-party dated October 22, 1879, rechartered her to the respondent for a voyage from Boston to either of certain specified ports in the United Kingdom and on the continent of Europe. By the terms of the charter-party the respondent engaged to provide and furnish to the vessel a full and complete cargo of wheat ^{and} _{or} Indian corn. The libellant engaged that the vessel should prepare for bulk ^{and} _{or} bag grain at her expense; that she should be tight, staunch, and strong, and in every way fitted for

such voyage, and should receive on board the merchandise mentioned. It was also provided that, should the vessel not be at Boston on or before January 15, 1880, the charterer was to have the option of canceling the charter-party. The lay days were to commence when the vessel was ready and prepared to load bulk grain, and written notice thereof given to the charterer. The *Vesta* arrived in Boston about January 1st, and, having been prepared to load bulk grain, the master, on January 15th, gave written notice to the respondent that she was then ready to receive her cargo, and the lay days would begin to run on the 16th. The respondent at that time owned a cargo of wheat in the elevator at East Boston, which he desired to ship to Europe, and the bark was taken round to the elevator wharf to receive the wheat in bulk. Before proceeding to load, the respondent attempted to procure insurance on the cargo of wheat, but the risk was declined by all the companies to whom he made application; the reason for the refusal assigned by the underwriters being that the vessel was old and built of soft wood. The respondent then declined to load the vessel, claiming she was unseaworthy and not fit to perform the voyage. The question to be decided is whether, under the circumstances of the case, he was justified in so doing.

The rule of law applicable to the case seems to be well settled. The obligation of the libellant under this charter-party was to supply a vessel reasonably fit to carry for this particular voyage a reasonable cargo of any of the kinds of merchandise stipulated for. The charterer was entitled to have the vessel in a reasonable condition for the carriage of wheat in bulk across the Atlantic ocean in the winter months, and if she was not in such a condition he was not bound to load her. *Stanton v. Richardson*, 7 L. R. C. C. P. 421; S. C. 9 L. R. C. C. P. 390; S. C. 33 L. T. 193.

Shipmasters of great experience were called on both sides to give their opinion as to the fitness of the vessel for the voyage. The circumstances of the case seem to confirm the opinions of those called by the respondent, who pronounced the *Vesta* unfit to carry wheat in bulk across the Atlantic

in the winter months. Wheat in bulk is one of the most dangerous kinds of cargo a vessel can carry, owing to its liability to shift in heavy weather, and to choke the pumps. The *Vesta* was built of soft Norway pine. The voyage was to be in the months when storms are the most frequent and severe. She was rejected by the underwriters as an unsafe risk, and on this account was useless to the charterer for the purpose for which she was chartered. In the export grain business wheat is usually sold to arrive. Bills are drawn against the cargo upon the consignees abroad, payable in London, to which are attached the bill of lading, the certificate of loading, and the insurance certificate. Upon this security advances are obtained upon the cargo. Without the insurance certificate the bills would be of no value for this purpose, and the exporter would be deprived of his advance, which is one of the necessities of the business. The charterer would certainly have acted more wisely if he had insisted upon a stipulation in the contract that the vessel should be a good sea risk for the merchandise specified as cargo. But the impressive fact remains that no insurance company could be found, after reasonable search, that was willing to assume the risk of this voyage under the circumstances stated. To require the charterer to load such a vessel would be a hardship which these parties could not have contemplated when this charter-party was signed. It should be noticed that neither of the parties had ever seen this vessel, or knew anything of her condition, until she arrived in Boston.

The libellant insists that the efforts of the respondent to obtain insurance were not sincere, and his purpose was to escape from his contract on account of the fall in freights which took place after the charter-party was signed. This, however, is not proved. The wheat market was also falling, and it was for the interest of the respondent to get his wheat to market as soon as possible. I am quite satisfied he made all reasonable effort to get insurance.

It appeared that, later in the season, the *Vesta* was loaded with a mixed cargo of wheat and Indian corn, in bulk, at this port, which she carried and delivered in good condition at an

European port, and insurance was obtained on this cargo. This is certainly a circumstance in favor of the vessel; but, upon all the evidence, I am of opinion the libellant's warranty was broken, and the respondent was justified in refusing to load the vessel. The respondent's allegation that he was induced to sign the charter-party by the fraudulent representations of the libellant is clearly not proved.

Libel dismissed, with costs.

THE JOHN A. BERKMAN.

(District Court, D. Massachusetts. January, 1881.)

1. DOCK—LIABILITY OF OWNER OR OCCUPANT.

"The owner or occupant of a dock is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care—if there is a defect which is known to him, or which, by the use of ordinary care and diligence, should be known to him—he is guilty of negligence, and liable to the person who, using due care, is injured thereby."

Nickerson v. Tirrell, 127 Mass. 236.

2. SAME—LIABILITY OF VESSEL.

Held, under the circumstances of this case, that the master of a vessel was at fault in attempting to enter a dock after the tide had fallen, when he knew that he was about to enter a dock where his vessel could not float at all conditions of the tide.

3. SAME—LIABILITY OF OWNER.

Held, further, under the circumstances, that the owner of the dock was also in fault in not cautioning the vessel to stop before she reached the point where she was injured by grounding.—[ED.]

J. C. Dodge & Sons, for libellants.

H. N. Shepard, for respondents.

NELSON, D. J. This is a cause of damage. The libellants are the owners of the schooner *John A. Berkman*, and the

respondents are the proprietors of a coal wharf in East Boston. On the twenty-eighth of November, 1878, the schooner arrived at this port, having on board a cargo of coal consigned to the respondents. On the following day she entered the dock, but before reaching her discharging berth at the wharf she grounded. At the next tide, in the night-time, a further attempt was made to haul her to her berth, but failed. The next day, at high water, the attempt was renewed, and this time with success. She was then placed in her discharging berth and her cargo discharged. During these proceedings the schooner sustained injury from being strained and hogged, and the question in the case is whether the respondents, as owners of the dock, are responsible for the damage, and to what extent.

It was the expectation of the parties that the schooner was to enter the dock at high water, and was to take the ground as the tide receded. It is usual for coal vessels to take the ground at low water when discharging at the coal wharves in Boston.

The rule of law applicable to this case is well settled, and is not in dispute. The last case upon the subject is *Nickerson v. Tirrell*, 127 Mass. 236, and the rule is thus stated by *Morton, J.*: "The owner or occupant of a dock is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care—if there is a defect which is known to him, or which, by the use of ordinary care or diligence, should be known to him—he is guilty of negligence, and liable to the person who, using due care, is injured thereby." I adopt this as a full and accurate statement of the law of this case.

Upon a careful review of all the evidence in the case I

have come to the following conclusions upon the questions of fact in dispute:

1. That there was a sufficient depth of water in the dock to allow the schooner, with her depth of 13 feet, to enter and float with entire safety at high water.

2. That the dock was sufficiently dredged, and that there was no such unevenness or inequality in the surface of the hard bottom of the dock, and no such accumulations of mud, as to make it unsafe for this vessel to lie on the bottom at low water.

3. That the evidence is not sufficient to satisfy me that a log or stick of timber was imbedded in the dock, which would have caused the injury to the schooner.

4. The bill of lading, signed by the master, and accepted by the respondents' agent in Philadelphia, contained the memorandum, "Plenty water." This was relied upon at the hearing, though it is not charged in the libel. But conceding this to be open to the libellants, and that it is in effect a warranty of the sufficiency of the depth of water in the dock for the schooner, I yet find, in view of the understanding of the parties, when the bill of lading was signed, and the usage of coal vessels arriving in Boston to take the ground at low water when lying at coal wharves, that there was no breach of the warranty.

Upon all the foregoing issues of fact I find for the respondents. But upon another ground, in my opinion, the respondents are less fortunate, and this accident may be attributed, in part at least, to their want of reasonable care. It appears that the schooner, on her arrival on the 28th, anchored in the stream opposite the respondents' wharf. The next day one of the respondents came to the end of the wharf and beckoned to the schooner to enter the dock. At that time the tide was at its full height, and if the schooner had started at once she would have reached her berth in safety. But a considerable time was consumed in getting her anchor, and no special haste seems to have been made by those in charge of her; at all events, valuable time was lost, and she did not reach the spot where she first grounded until the tide had

fallen to such an extent as to render it unsafe to proceed. The master knew he was about to enter a dock where his vessel could not float at all conditions of the tide, and he was at fault in attempting to enter such a dock after the tide had fallen. The respondents were also at fault. The respondent who was present should have cautioned the schooner to stop before she reached the point of danger. For this failure of duty the respondents should be held responsible.

The preponderance of the evidence shows the injury to have been caused by the grounding at this point, and the efforts made to move her. As the negligence of both the parties contributed to this result, I pronounce for the libellants for one-half the damages. I do not find that the build of the schooner, being a single-deck, center-board vessel, with great breadth of beam as compared with her draught, rendered her unsuitable to carry a cargo of coal. Nor was it negligence in the master not to enter the dock until the day after her arrival. Stress was laid on both these circumstances by the respondents, but I deem them immaterial.

In repairing the schooner after the accident a second deck was built on her. The libellants claimed this was made necessary by the injuries resulting from the accident. But it was shown she was originally constructed with a view of having a second deck added at some future time. I am of opinion this deck was put on in pursuance of the original plan, and was not made necessary by the injuries received in the dock. In the assessment of damages the expense of the new deck is not to be included.

Interlocutory decree for the libellants accordingly.

THE S. L. GOODAL.

(District Court, D. Connecticut. April 8, 1881.)

1. MENHADEN OR WHITE-FISH FISHERY—SEAMEN'S WAGES—CUSTOM

Andrew C. Lippitt, for libellants.

Thomas M. Waller, for owners.

SHIPMAN, D. J. This is a libel *in rem* to recover the amount alleged to be due the libellants for services as seamen on board the fishing steamer S. L. Goodal during the summer and fall of 1879. The controversy relates to the wages of seamen, by custom, in the menhaden or white-fish fishery. The menhaden fishery commenced along the coast of Connecticut and Rhode Island at least 35 years ago. Vessels which fish exclusively in the waters near Long Island, Connecticut, and Rhode Island are called the western fleet, and those waters are called western waters. Vessels which fish off the coast of Maine are called the eastern fleet, and are said to fish in eastern waters. The customs of the business respecting the wages of seamen differ in eastern and western fleets except that universally the crews pay for their board and the cooks' wages and board.

1. The custom of the business upon western vessels.

When the business started, some 35 or 40 years ago, it was carried on solely by sailing vessels, and the fish were sold to the farmers on the coast. Fish-oil factories, for the conversion of fish into fertilizers, were unknown. The uniform rule, in the absence of special contract, was that the owners were to receive one-third and the master and crew were to receive two-thirds of the catch; and this meant two-thirds of the price at which the fish were sold. The outfit of seines, barrels, salt, etc., was provided by the vessel. In process of time fish-oil factories were erected by companies who also owned vessels, and these factories were the only consumers of the fish. Nearly all the sailing vessels were now owned or chartered by the factory owners. The owners of the vessels and of the factories being the same, there could

be no sale of the fish, so that the price of the fish, as between the owners and seamen, began to be established by an agreement, or by common consent among the leading factory owners. This price was not necessarily the same as the market value of the fish, but was what the owners thought they could afford to pay. In 1872 or 1873 the use of steamers commenced, and, in the absence of a special contract, the custom was that the owners were to receive one-half and the crew were to receive one-half of the price for which the fish were sold. The steamers were much more expensive than sailing vessels, and required an expensive outfit of coal. The owners found that if this rule of payment was literally obeyed the business would be a losing one. The factory owners, who also owned steam-vessels, continued to establish a price at which they settled with their crews, and after 1876, at the beginning of the season, both nominal and real prices were also established, at which the factories bought of the owners of steamers who were not interested in the factories. The nominal and lesser price was the pretended price of the fish, at which settlements were made with the crews. The real price included an addition of bonus for the captain and of a bonus for the owners. Thus, if the real price was 40 cents per barrel, the nominal price would be 25 cents, with a bonus of five cents to the captain, and of 10 cents to the owners, and the owners settled with the crew by the payment of $12\frac{1}{2}$ cents per barrel. This practice has been common since 1876. This subterfuge is the cause of much of the confusion of testimony in this case. The custom of the business required that the crews of steam-vessels should receive half the actual price of the fish. The fact is, they have been receiving half of the fictitious price of the fish. As the case of the libellants does not relate to the western fleet, I express no opinion upon the propriety or unreasonableness of this attempted alteration of the established custom, except to say that this plan of nominal and real prices tends to create misunderstanding, dissatisfaction, and litigation.

2. The custom of the business in the eastern fleet.

The well-established and universally-admitted custom of

the business has been that seamen on board steamers receive one-half of the catch at a tariff rate established, printed, and circulated in the winter before sailing by the Maine Oil & Guano Association. The following is the tariff which was established on January 14, 1879, for the season of 1879: "Voted, to pay the following prices for fish at factory: 30 cents per barrel to August 1st, 60 cents per barrel to September 20th, and 80 cents per barrel to the end of the season in Maine." The price of bait was fixed at \$1.25 per barrel to August 1st, and \$1.50 to the end of the season, to be equally divided between factory, steamer, and crew. The Maine fish are fatter and more valuable than the western fish, but do not come so early in the summer, and leave earlier in the fall, consequently there is an opportunity for the eastern fleet to fish in western waters early in the season, and to return and fish after the Maine fish have left the eastern coast. This system has gradually become prevalent, and for the last four or five years it is a universal practice for the eastern fleet to fish also in the spring, and in the fall, if practicable, in western waters, going to the east in June and staying as late as the success of the business permits. When the men are shipped, no special contract is in general made. For the Maine fishing, the rule of payment is in accordance with the tariff of the Maine Oil & Guano Association. The western fishing was at first an incident and not a main part of the business, and the general understanding has been that the seamen should receive for their one-half of the spring western catch the "going price,"—that is to say, the established price which was being in fact paid in western waters,—and if they returned and fished in the fall they should receive what should be thereafter established by the general consent of the owners. This habit of settlement has grown up, partly because the eastern fishing was the best part of the business and the western fishing was not so much thought about, and partly because it had now got to be a habit among the owners of the eastern fleet to establish themselves the prices for the seamen.

I cannot find that the eastern crews, when they fished in

western waters, fell back upon the custom of the western fleet to have one-half of the catch at the selling price, but I am of opinion that as for Maine fishing they received a tariff rate established by the owners. So the general idea was that they were to receive for western fishing their half, at a tariff rate fixed by the owners. This, I think, was the general, not the universal, idea of the crews, although it is difficult to ascertain the exact idea which they had. The old custom in the western fishery, and the fact that crews of eastern fleets were shipped in or near New London, and fished now in one and now in the other fleet, and the recent change with respect to western fishing by eastern fishermen, have made this disputed question not easy of solution. Here again, as I have already said respecting the customs of the western fleet, the subterfuge in regard to nominal and real prices has confused the matter of wages, and has given strong occasion to some of the seamen to believe that they were being imposed upon. In some cases it was understood by the eastern sailors before they started what the contract price was and would be; and, in these cases, there was no misunderstanding.

The S. L. Goodal is a steam vessel, and has always belonged to the eastern fleet. Her owners live in Groton, Connecticut, but have a factory in Maine, to which the Goodal delivers her eastern fish. The crew were shipped under no special contract, but under the custom of the business. The vessel was employed in fishing, as usual, in western waters, during the last part of April and in May. Payn, Higgins & Co., of Long Island, bought most of the catch at 42 cents per barrel, and the men were paid at the rate of 25 cents per barrel, which was the established price for seamen during that spring. The vessel went to Maine in June, was absent two weeks, and, like all other vessels, caught no fish. There were no fish off the coast of Maine during that season. Like many other vessels of the eastern fleet, she returned to western waters about July 3d, and there fished till about the middle of November. The fish were sold to the same purchasers at the same price, and the libellants were paid at

the same rate of 25 cents. The crews of all other eastern vessels were paid at the same rate, which was, as between owners and crew, a fair division of the catch. The libellants, having lost the usual catch in Maine, while their expenses were not diminished, made a very poor summer's work, became much dissatisfied, refused to settle at the rate which was offered by the owners, and brought this libel, insisting upon their right to 21 cents per barrel.

The whole number of barrels which were caught was 12,285; 170 barrels were sold for bait. The libellants have not been paid in full, although the owners have been ready and willing to settle for 12½ cents per barrel. It is understood that the fish sold for bait are settled for at a special rate at 40 cents per barrel; that is to say, if a barrel sold for 80 cents, it is called two barrels, and if sold for 60 cents it is called 1½ barrels. I am not advised that objection is made by the libellants to this method of accounting for the bait money. From the findings already made in regard to the custom of the business in the eastern fleet, it appears that the owners of the vessel pursued the generally-accepted understanding in regard to payment of the eastern crews, and which resulted in this case in a proper rate of compensation.

As an accounting is still to be had, in order to ascertain how much is due to each person, let there be a reference to a commissioner, in case of a disagreement between the parties, to ascertain the amount due to each libellant upon the rules heretofore stated.

THE STEAM-SHIP MISSISSIPPI.

(*District Court, D. Massachusetts.* February 11, 1881.)

1. USE OF DRY DOCK—MARITIME CONTRACT—WHARFAGE—MARITIME LIEN—MASS. GEN. ST. c. 151, § 1.

NELSON, D. J. Libel by the Simpson Patent Dry Dock Company, a Massachusetts corporation, to enforce against the steam-ship Mississippi, owned and registered in this port, a lien for the use of a dry dock in Boston. The libel alleges

that in the year 1879 the steam-ship Mississippi, then lying in the port of Boston, stood in need of certain supplies, disbursements, and services to render her seaworthy, and to enable her to proceed on her intended voyage; that the libellants, at the request of the master or agents of the steam-ship, furnished a berth in their dry-dock yard for the steam-ship to lie in while undergoing said repairs, the wharfage or dockage whereof amounts to \$519; that said berth or wharfage or dockage was necessary for said steam-ship, and was furnished upon the credit of the vessel. It appeared that after leaving the dry dock the steam-ship made a voyage to the Western islands and Madeira and return, and that no statement of the libellants' claim was ever filed in the city clerk's office.

Upon these facts the court decided as follows:

1. The contract for the use of the dry dock was a maritime contract, and as such is cognizable in the admiralty.

2. The accomodation furnished was not wharfage.

3. For such service furnished at her home port no lien attached to the vessel under the general maritime law.

4. For such service a lien is given by the Mass. Gen. St. c. 151, § 1, which enacts that "when, by virtue of a contract, expressed or implied, with the owners of a ship or vessel, or with the agents, contractors, or subcontractors of such owners, or any of them, or with any person having been employed to * * * repair * * * such ship or vessel, or to assist them, money is due to any person for labor performed, materials used, or labor or materials furnished in the * * * repairs of * * * or for provisions, stores, or other articles furnished for or on account of such ship or vessel in this state, such person shall have a lien upon the ship or vessel, her tackle, apparel, and furniture, to secure the payment of such debt." This lien may be enforced in the admiralty.

5. The lien given by the statute was lost by the failure of the libellants to comply with the second section of the act, which provides that the lien shall be dissolved unless a sworn statement of the claim is filed with the clerk of the city or town within four days from the time the ship or vessel departs from the port.

Libel dismissed.

BANK OF BRITISH NORTH AMERICA v. MILLER and others.

(Circuit Court, D. Oregon. April 6, 1881.)

1. APPURTENANCE.

A water right, granted in gross, does not become technically appurtenant to land and a mill upon and for which it is subsequently used by the grantee thereof; but where such water-power is taken and applied to run a mill belonging to the owner of the power, and afterwards, while the water-power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith, as parcel thereof, if such appears to have been the intention of the parties.

2. WATER-POWER NOT APPURTENANT, WHEN PASSES WITH LAND.

In 1864 a water right was granted by the owner of the basin at Oregon City, in gross; and in 1866 the same was taken and applied to the use of a paper mill and machine shop on block 2, in said town; and in 1867, the same being the property of the owners of the water-power, they converted it into a flour mill and applied such water-power to the use thereof, continuously and exclusively, until 1878, when the owner of the mill and power conveyed the mill, describing the property by metes and bounds only, and without any express mention of said water right, to secure a loan of \$20,000, payable in two years, with interest at the rate of 1 per cent. per month; the said property, including said water right, being then worth not to exceed \$25,000, of which sum the water right was worth one-third. *Held*, that, upon the facts and circumstances of the case, it satisfactorily appeared that it was the intention of the parties that the water right should pass with the land and mill; and, being then used in connection therewith, it did so pass as parcel thereof.

In Equity. Suit to enforce the lien of a mortgage.

Ellis G. Hughes, for plaintiff.

W. Carey Johnson and William Strong, for defendant Apperson.

DEADY, D. J. On April 13, 1878, James D. Miller and wife conveyed the following-described property to John T. Apperson, as the executor of the will of George La Rocque, to secure the payment of the promissory note of said Miller, of the same date, for the sum of \$20,000, with interest at 1 per centum per month, payable to said Apperson, or order, on or before two years after date, to wit: lots 5 and 6, in block 2, in Oregon City, Oregon; and also a portion of lots

7 and 8 in said block, constituting a parallelogram, bounded on the west by the western line of said lots, and 40 feet in width, and also a rectangle triangular portion of the remainder of said lot 7, situate in the south-west corner thereof, and having a west line of 30 feet and a south one of 16 feet in length; *habendum*, "to have and to hold the said premises and appurtenances."

The mortgage also contained an agreement that Miller would keep the "buildings" on the premises insured at \$20,000, and if he failed to do so the mortgagee might foreclose, or procure said insurance and tack the expense thereof to his mortgage. On January 2, 1880, the mortgage aforesaid being in full force and only \$3,000 interest paid thereon, said Miller and wife conveyed the lots and portions of lots aforesaid to Oliver C. Yocum, to secure the payment of the promissory note of said Miller of December 31, 1879, for the sum of \$11,500, with interest at the rate of 1 per centum per month, payable to said Yocum or order one day after date; and also the water-right formerly conveyed to the Oregon Paper Manufacturing Company by George Marshall, John H. Moore, and Samuel L. Stevens, by deed of June 8, 1866, to-wit: the perpetual right to take 300 inches of the water which flows from the channel of the Wallamet river, east of Abernethy's island, into the basin of Daniel Harvey, on his mill reserve, on the Oregon City claim, under an average head of eight feet in said basin at low water, together with the right of way across the land of said Harvey for a race to carry said water from the north line of said basin to the south end of Main street in said city; said right and easement being particularly described in a deed executed by said Harvey, Moore, Marshall, Stevens, aforesaid, and Joseph Switzler, on August 9, 1864, which note and mortgage were, on January 3, 1880, in consideration of \$11,500, duly transferred to the Bank of British North America.

On April 1, 1880, the plaintiff commenced this suit upon said note and mortgage, making said Miller and wife and Apperson defendants therein, and admitting in its bill the

existence and priority of the mortgage to Apperson, but claiming that such mortgage does not include the water right and easement aforesaid, and praying a sale of the premises and a distribution of the proceeds according to such admission and claim. On June 18th the bill was taken for confessed as against Miller and wife. On May 3d the defendant Apperson answered, alleging that at the date of his mortgage and long before, the defendant Miller was the owner in fee of the real property described in the mortgage, and also of the easement and water right aforesaid; that there was a grist mill and warehouse and other tenements upon said property, used by said Miller and his grantors for the manufacture, storage, and shipment of flour, wheat, and mill offal; that at the date of said mortgage, and long before, the said Miller and his grantors had annexed and made appurtenant to said lots said easement and water right, and used the same to propel the machinery of said mill and warehouse; and that they are included in his mortgage. On August 2d the defendant Apperson filed a cross-bill stating therein the facts contained in his answer, and praying for a sale of the premises, including the easement and water right, and that the proceeds be first applied to the payment of his debt and costs of suit.

The plaintiff answered the cross-bill, denying that the easement and water right were included in the defendants' mortgage. Replications to the answers to the bill and cross-bill were filed, and testimony taken upon the point in issue. The case was argued and submitted upon the pleadings, evidence, and a stipulation as to the facts concerning the origin and ownership of the easement and water right up to the date of the defendants' mortgage. From this stipulation it appears that the easement and water right aforesaid were created and vested in Moore, Marshall, Stevens, and Switzler, aforesaid, by the deed of Daniel Harvey and Eloisa, his wife, dated August 9, 1864,—the two-fifths thereof to said Moore, and one-fifth thereof to each of the other of said grantees,—upon sundry conditions as to the use thereof not material to this controversy; that at the date of such conveyance said

water right was in no way connected with or appurtenant to any real property owned by said grantees, or that described in the mortgages to the plaintiff or defendant Apperson; that on August 10, 1864, said grantees acquired said lot 8 as tenants in common, in the same proportion as they owned the water right; that on March 8, 1865, said Moore, Marshall, Stevens, and the heirs of said Switzler, then deceased, acquired said lots 5 and 6 in the same proportion, and on June 7, 1866, the successors in interest of said Switzler conveyed to said Moore, Marshall, and Stevens the undivided one-fifth of said lots 5, 6, and 8, and water right and easement; that on June 8, 1866, said Moore, Marshall, and Stevens conveyed to the Oregon City Paper Manufacturing Company said lot 5, and the undivided half of said easement and water right, reserving six feet and four inches in width along the easterly side of said lot, and within the walls of the building then being built thereon, on which to construct a flume or penstock, for the purpose of conveying water for the equal use of the parties in said deed and their assigns, and also a strip of land two feet and six inches in width on either side of the northerly line of said lot 5, to be used by said parties and their assigns as a tail-race; that on March 4, 1868, said Oregon City Paper Manufacturing Company conveyed its interest as aforesaid in said lot 5, and easement and water right, to A. I. Block; that on August 22, 1868, said Marshall conveyed to said Moore the undivided one-fourth of said lots 6, 7, and 8, and also the undivided one-eighth of said easement and water right; that on June 26, 1869, said Stevens conveyed to said Moore the undivided one-fourth of said lots 6, 7, and 8, and the undivided one-eighth of said easement and water right; that on September 7, 1868, said Block conveyed said lot 5, and the undivided half of said easement and water-power, to the defendant Miller, C. P. Church, and said Marshall,—one-half to said Miller, and one-fourth to said Church and Marshall each; and on September 4, 1876, said Marshall conveyed to said Church the undivided one-fourth of said lot 5, together with the “tenements, hereditaments, and appur-

tenances," without any special mention of water rights; that on November 17, 1876, said Moore conveyed to said Miller and Church said lot 6, and the portions of said lots 7 and 8 above described, and the undivided one-half of said easement and water right; and that on April 9, 1878, said Church conveyed to said Miller the undivided one-half of said lots 5 and 6, and said portions of said lots 7 and 8, "together with all the mills, buildings, warehouses, water rights, and privileges and easements thereon or appurtenant thereto."

In the conveyances of August 22, 1868, and June 26, 1869 the interest in the water right was the subject of a separate conveyance; and in all other conveyances of any interest in said water-right, in conjunction or simultaneous with any interest in said lots or either of them, the same was made by one instrument, containing, however, a special description thereof, except as otherwise appears from the foregoing statement.

It also appears from the evidence that at and before 1867 the water in question was conducted from the basin in an under-ground flume, on Main and Third streets, to the lots in question, under an ordinance of the city allowing the use of such streets for such purposes, and after being used thereon was discharged through a tail race into the Wallamet river; that said water was brought to lot 5, and about the half of it used to run a paper mill thereon, and 18 or 20 inches more in a machine shop on said lot 6, belonging to said Moore; that in 1867 said paper mill was converted into a flour mill, and has been so used ever since; that since before 1876 all of said water-power was used to run said mill and machinery, and has never been used otherwise nor elsewhere than as above stated; that at and before the date of the mortgage to Apperson the mill contained five run of stones, with the necessary machinery; that there was upon the premises, and used in connection with the mill, a wharf and warehouse, and an elevator for lifting wheat from the river; that the water-power is worth one-third of the value of the site, the improvements thereon, and the power; that there is a large surplus

of water in the basin from which this is obtained, but whether it can be purchased, and if so upon what terms, does not appear; and that the property, including the water right, was on August 9, 1880, sold by the master of this court upon an interlocutory decree to the defendant Apperson and W. Carey Johnson for the sum of \$22,000.

Upon the argument the learned counsel for the plaintiffs cited and commented upon many cases, touching the question of what privileges, rights, and easements are or may be appurtenant to land, and will therefore pass to the grantee of the latter without being named in the conveyance thereof, and what are not so appurtenant. It is admitted that the water right in question is not "appurtenant" to the land in question, in the technical sense of that term, so that it could not exist separate and apart from it, and would pass with it, without mention or special agreement to that effect.

This water right was created and existed as a substantive and independent right, in gross, before the acquisition by the owners thereof of the lots mentioned in the mortgages. It was an easement without any fixed or limited dominant estate—whatever property it might be used with or upon being such estate for the time being; and although it has since been taken to said lots, and there applied to run a mill and machinery thereon, and thereby become, so to speak, in fact appurtenant to such property, still it may be again separated therefrom and taken and applied elsewhere. The water right was granted without any restriction or limitation as to the nature or place of its use, and therefore the power may be applied as and where the circumstances will permit, and such application may be changed from time to time, both as to use and place, at the pleasure of the owner. *Hart v. Curtis*, 7 Met. 94; *Linthicum v. Ray*, 9 Wall. 242; *Ackroyd v. Smith*, 16 Com. Bench, 184; *De Witt v. Harvey*, 4 Gray, 487; *Garrison v. Rudd*, 19 Ill. 558; *Goodrich v. Burbank*, 12 Allen, 459.

It is also clear that a sale of any real property carries with it any easement or privilege which is necessary to its enjoy-

ment, and at the time is in use thereon and therewith, as an appurtenance in fact, although not technically so at law, and this upon the presumption, more or less cogent according to the circumstances, that it was the intention of the parties to the agreement of sale that it should pass with the property to which it was then apparently subservient. *Nicholas v. Chamberlain*, 3 Cro. 121; *Whitney v. Olney*, 3 Mas. 280; *U. S. v. Appleton*, 1 Sum. 500; *Thayer v. Payne*, 2 Cush. 327; *Strickler v. Todd*, 1 S. & R. 63, (13 Am. Dec. 349;) *Coolidge v. Hager*, 43 Ver. 9, (5 Am. Rep. 256;) *Sheets v. Selden*, 2 Wall. 186.

In such a case the question is simply as to the intention of the parties to be gathered from the terms of the conveyance, the subject-matter, and its use and situation at the time of the sale, or as was said by Mr. Justice Story in *U. S. v. Appleton*, *supra*: "In the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties. In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for." In this case it was held that the vendees of the wings of a building were entitled, as against a prior vendee of the central part thereof, to the use of the windows and doors opening on to the front porch of the latter, not because such right was technically appurtenant thereto, but because such porch was so used at the time of the sale of the wings.

In *Sheets v. Selden*, *supra*, it was held on the same principle, in the language of the syllabus, that upon the sale of a division of a canal belonging to the state of Indiana, "including its banks, margins, tow-paths, side cuts, feeders, basins, right of way, dams, water-power, structures, and all the appurtenances thereunto belonging," certain adjoining parcels of land belonging to the grantor, which were necessary to the use of the canal and water-power, and were used with it at the time, but which could not be included in any of the terms above, passed by the conveyance."

In *Lampman v. Milks*, it was held, when the owner of land across which flows a stream diverts the course of the latter, so as to relieve a portion of the tract from overflow, which he then sells, that neither he nor his grantees of the residue of the property can return the stream to its former bed to the damage of the first grantee. And in *Coolidge v. Hagar, supra*, it was held that the conveyance of a house and land by an ordinary warranty deed carried with it, by implication, the right which the grantor then had to water conveyed to the premises by means of an aqueduct from a distant spring.

This doctrine has been very strongly applied in the case of the grant of a mill messuage, or house, *eo nomine*. In the former case it has been decided that the grant will carry with it a parcel of land adjoining the mill, and used in connection with it, as well as that upon which it stands; and also the right to the water from a particular creek owned by the grantor, and then used to run the mill.

In *Whitney v. Olney, supra*, it was held that land adjacent to and commonly used with a "mill," although not technically appurtenant thereto, passed by a devise thereof, upon the ground that its use made it "parcel of the mill," and therefore it was presumed that it was intended to be comprehended within the term "mill," and devised by it. See, also, *U. S. v. Appleton, supra*, where Mr. Justice Story, in illustrating the proposition that upon the grant of a house it is implied from the nature of the grant, unless provision is made to the contrary, that the grantee shall possess the house in the manner and with the beneficial rights as were then in use and belonging to it, said: "It is strictly a question what passes by the grant. Thus, if a man sells a mill, which at the time has a particular stream of water flowing to it, the right to the water passes as an appurtenance, although the grantor was, at the time of the grant, the owner of all the stream above and below the mill. And it will make no difference that the mill was once another person's, and that the adverse right to use the stream had been acquired by the former owner, and might have been afterwards extinguished

by unity of possession in the grantor. The law gives a reasonable intendment in all such cases to the grant, and passes with the property all those easements and privileges which at the time belong to it, and are in use as appurtenances."

Upon these authorities, as well as the reason of the case, in my judgment, the conveyance to the defendant Apperson of the premises by metes and bounds, under the circumstances, passed the water right then owned by the grantor, Miller, and used in and upon the premises for any beneficial purpose.

It is admitted by the counsel for the plaintiff that if the conveyance to Apperson had described the premises as a "mill," the water-power then used to run it would have passed with it to the grantee. But the conveyance was in fact of a mill—a mill was the actual subject of the sale and conveyance, the thing which the parties dealt with and for—and it is not apparent why the mere difference in the mode of description of the property should make any such difference in the effect or result of the conveyance.

But, independent of this consideration, it is apparent from the circumstances that it was the intention of the parties to mortgage the water-power as well as the land and buildings thereon; because—(1) It was then in use upon the premises to run the mill and machinery then in active operation, and had never been used elsewhere, and must, in the nature of things, have been regarded as one property; (2) it was an apparent and continuous easement in actual use upon and for the benefit of the premises described in the mortgage, and gave them at least one-third of their value and probably much more of their salableness; and, (3) without it the premises were not a sufficient security for the money loaned upon them.

And therefore, although this water-power is not nor never was technically appurtenant to this land or mill, so that it could not exist separately from them, and would pass by operation of law with a conveyance of them, independent of the intention of the parties, still, at the date of the defendant's mortgage it was in fact appurtenant to the prem-

ises, and might pass with a conveyance of them, although not specially mentioned or described therein, if such was the intention of the parties, of which I think there can be no doubt.

The controversy between the plaintiff and defendant concerning the right to this water is purely a legal one. The former has no claim to any superior equity or merit over the latter. It was not misled by the terms of the defendants' mortgage to give credit to any one upon the supposition that Miller still owned the water-power unaffected by the mortgage to Apperson, but having an unsecured debt against Miller or Yocum, or both, it took this mortgage for what might be made out of the property as against the defendant Apperson.

The decision of the court will be that the plaintiff recover of the defendant Miller the sum of \$11,500, with interest thereon from January 2, 1880, and that the defendant Apperson recover of said defendant the sum of \$20,000, with interest thereon from October 13, 1879; that the lien of the mortgage of said Apperson extends to the water-power, as well as the lots and improvements thereon; and that the amount due said Apperson be first paid from the proceeds of the sale of said premises, together with the legal costs and expenses incurred by him in this suit; and that the balance, if any, be applied upon the debt due the plaintiff; and that the lien of both said mortgages be held satisfied, and the purchaser of the premises take the same discharged therefrom.

ALLERTON v. CITY OF CHICAGO and another.

(Circuit Court, N. D. Illinois. December 10, 1880.)

1. MUNICIPAL CORPORATION—STREET RAILWAY—POWER TO LICENSE.

A general law of the state of Illinois, (1872,) for the incorporation of cities and villages in the state, provided that the city council in cities should have authority to license hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing like occupations, and to prescribe their compensation. *Held*, that street railways were within the purview of such statute.

2. SAME—POLICE POWER.

An ordinance of the council of the city of Chicago (March 18, 1878) required each street railway company within the city to obtain an annual license, and to pay for the same the sum of \$50 for each car operated and run upon its line. *Held*, that such ordinance was a valid exercise of the police power of the city council.—[Ed.]

In Equity.

Hitchcock, Dupee & Judah, E. A. Small, C. Beckwith, and Goudy, Chandler & Skinner, for plaintiff.

R. S. Tuthill and A. S. Bradley, for City of Chicago.

DRUMMOND, C. J. On March 18, 1878, the council of the city of Chicago passed an ordinance requiring the companies which operated street cars for the conveyance of passengers upon any lines of horse or city railway within the city of Chicago to obtain a license in the month of April of each year, and pay for the same the sum of \$50 for each car operated or run. A penalty was imposed for failing or refusing to take out a license. The company obtaining the license was required to place conspicuously in every car so operated and run in the city a certificate signed by the city clerk, and giving the number of the car, and stating that a license had been obtained, and that the necessary fee had been paid; and a penalty was also imposed for a failure to post or keep such certificate in the car.

The only question in the case, which arises on a demurrer to the bill of complaint filed by a stockholder of the city railway company to enjoin the payment of the license fee, is whether this ordinance was valid. Several corporations operating street cars in the city of Chicago have been au-

thorized to construct their railways, and operate them, by various ordinances which have been from time to time passed; and these ordinances have been recognized and affirmed, many of them, by the legislature of the state. By virtue of these ordinances and acts of the legislature the companies have the right to run their cars for the transit of passengers through the city. It cannot be said, therefore, that the effect of the ordinance which has been specially referred to, although it is called a license, would be to give the companies the privilege of running their cars. That they have by virtue of the ordinance and the acts of the legislature. There can be no doubt that the legislature would have the right, under the constitution of 1848, which was in force when the franchise was granted, to tax the corporations for the use of their franchise; that is, a tax which is entirely independent of the value of the cars, tracks, and other tangible property of the corporations, and so treated by the constitutions of 1848 and 1870. But there are many difficulties with this branch of the subject. There are certain conditions required by the constitution of 1870 as prerequisites to the imposition of a tax of this kind, even conceding that the legislature has authorized the city to impose the tax, and I therefore, without giving any decided opinion upon that part of the case, prefer to place my decision upon another ground, and to sustain the ordinance as a regulation of the police power of the city. This is always a subsisting power, which, it is generally held, cannot be transferred by the city, but is inherent in its municipal organization. There can be no controversy about the power of the city over many things connected with the operation of the city railway. Admitting that because of the price of fare agreed upon there can be no change in that, yet, by virtue of its police power, the city can, to a great extent, regulate the running of the cars, prescribe rules and laws as to speed, stoppage, and other things connected with the operation of the railway. This has not been questioned by the counsel of the plaintiff; but it is claimed this cannot be considered a police regulation, because it is manifestly the exercise of the taxing power of the city. It is argued

that the price of the license is so large that the intent is manifest. It is very difficult to lay down any absolute rule upon this subject, and to hold that a particular sum may be within the police power of the city, and another sum beyond the power, and a mere tax.

By the general law of 1872, for the incorporation of cities and villages in this state, it is provided that the city council in cities shall have authority to license hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing like occupations, and to prescribe their compensation. This was obviously intended as conferring a police power upon the city council in relation to the various classes named in the statute. This is a power that has been uniformly exercised, and, construing the statute literally, cannot well be questioned. But it is claimed it does not include the street railway, because it is not pursuing an occupation like any of those named.

Omnibuses may be licensed. They may pass over even the same streets as those occupied by the horse railways, and they may carry passengers in the same manner. The only distinction which can be called substantial between the two classes of occupation is that one carriage goes upon iron rails, in a regular track, with wheels, and the other carriage goes with wheels upon the ordinary street way.

The supreme court of Pennsylvania has held that these street-railway carriages are of a like nature as omnibuses, and there can be no doubt, I think, of the right of the city to demand a license from all omnibus drivers, and to include every omnibus which may belong to a particular company or corporation, and to require the payment of a license for such omnibus that may be so owned and used.

The court of appeals of New York, in the case of *Mayor v. Second Avenue R.* 32 N. Y. 261, held that an ordinance of the city of New York, in many respects like this, was invalid, as an attempt, through color of a license, to impose a tax upon the railroad company, refusing to treat it as an exercise of the police power of the city. The price charged in that case for the license was the same as in this.

In the case of *Frankfort & Philadelphia Passenger Co. v. City of Philadelphia*, 58 Pa. St. 119, where the license fee was the same, and *Johnson v. Philadelphia*, 60 Pa. St. 445, the supreme court of Pennsylvania took a different view of such an ordinance, and treated it as a police regulation merely; and such seems to be the view of the supreme court of this state in the case of the *Chicago Packing & Provision Co. v. City of Chicago*, 88 Ill. 221.

In the case of *Frankfort & Philadelphia Passenger Co. v. City of Philadelphia*, the city obtained its power to impose the license from a statute substantially similar to that under which the city of Chicago claims the power in this case. In that case the act of the legislature declared that the city council of Philadelphia should have authority to provide for the proper regulation of omnibuses, or vehicles in the nature thereof, and to this end "it shall be lawful for the council to provide for the issuing of licenses to such and so many persons as may apply to keep and use omnibuses, or vehicles in the nature thereof, and to charge a reasonable annual or other sum therefor." In that statute the words "vehicles in the nature thereof," in this the words "pursuing a like occupation," are used. I cannot see that there is any substantial distinction in that respect between the two statutes.

In the case of 88 Illinois, already referred to, the corporation was organized and doing business under the laws of this state. A question arose in that case as to the power of the city to issue a license. It was denied in the argument of the case that the power existed, but the supreme court held that, under the power "to regulate the management" of the business, the city had the right to issue a license and to prescribe the compensation. That was also under the same law—the act of 1872—which conferred power upon cities to grant licenses and regulate omnibus drivers, and all others pursuing a like occupation, and to prescribe their compensation. The supreme court of this state decides in that case that the power to require a license is one of the means of regulating the exercise of a pursuit or business; that there are other means that might be adopted to accomplish the purpose, but

that these municipal authorities are not restricted as to the means that they shall employ to regulate the business; and various authorities are cited by the court in support of the view which they take, and they repeat the ruling which had been previously made, that a license was not, in the constitutional sense of the term, a tax.

The supreme court must also have considered and passed upon a question which has been discussed in this case, namely, whether or not the act which gave the authority to the city to license was a general law under the constitution of this state; and they held that it was, and that it was intended to apply to all cities which might adopt it. It is true that was a case of licensing a business which was generally admitted to be injurious in its character to those near the place where it was carried on; but it was a question of power, and the point in controversy was whether the city of Chicago had the right to exercise the power of licensing. The license fee demanded in that case was \$100. It seems to me that the question involved in this case arose substantially in that, and it was decided by the supreme court of the state that it was a valid exercise of the power to regulate a particular business. That is also the view taken by the supreme court of Pennsylvania in the cases referred to. In view of these decisions, and of several decisions of the supreme court of the United States within the last few years, (*Munn v. Illinois*, 94 U. S. 113, and others,) I think the weight of authority is in favor of regarding this as a police regulation.

One of the difficulties I have had with the case has been whether it ought not to be regarded as a tax for revenue under the form of a license. It may be conceded that the argument is strong for treating it as a revenue measure; but, as I before stated, there are some objections which I consider very weighty, and which would prevent me at this time from placing the decision on that ground. It may be admitted that, viewing it as a police regulation requiring the payment of a fee for the license, in amount it goes to the very verge of the exercise of police power; but as other courts have held that such a tax did not exceed that limit, I cannot hold that

it does in this case; and therefore I shall, as at present advised, sustain the ordinance in question as a valid exercise of the police power of the city council.

There have been some arguments used by counsel which, I think, do not properly apply to the pleadings. It is insisted that the court must construe this as a tax, and not a mere police regulation. It is admitted that the court of appeals of New York did construe a similar license fee as a tax. The supreme court of Pennsylvania has given a different construction, and held it to be a police regulation. There is nothing in the bill by which the court can regard it absolutely as the exercise of the taxing power of the city. There is nothing in the bill which would authorize the court to hold, if it were a tax, that it was in violation of the constitution of 1870, as not being uniform upon the particular class on which it operates. It is urged that it cannot be treated as a tax, because, if so, it would not be within this requisition of the constitution of 1870, because the street railways come in direct competition with some of the steam railways; as that of the Illinois Central and the Northwestern to Hyde Park and Evanston. There is nothing in the pleadings which would warrant the court in considering these facts, unless the court should take judicial notice that they do thus come in competition, without any allegation in the pleadings. Under the authorities, and upon the statements contained in the pleadings, the court cannot necessarily construe this as a tax. The court is at liberty, I think, to construe it as a police regulation.

These views have been given for the purpose of enabling the parties, if they desire, to take the case to the supreme court of the United States. The district judge who heard the application for an injunction in the first instance, and granted it, is inclined to hold, as I understand, that this was not the proper exercise of the police power. I hold, for the purpose of deciding the case, that it is; and if the case is to be determined by the pleadings as they at present stand, it can be certified up to the supreme court as upon a division of opinion between the judges. If, however, the counsel

desire to raise some of the questions which have been discussed in the argument, I think it would be advisable for them to amend the bill; and, if they wish, leave will be granted for that purpose.

STANLEY v. BOARD OF SUP'RS OF ALBANY CO.

(*Circuit Court, N. D. New York.* April, 1881.)

I. SUIT ARISING UNDER THE LAWS OF THE UNITED STATES—ACT OF MARCH 3, 1875—NATIONAL BANK SHARES—TAXATION—REV. ST. § 5219.

An action to enforce a right conferred by section 5219 of the Revised Statutes, regarding the taxation of property in the shares of national banking associations, is a suit arising "under the laws of the United States," within the meaning of the act of March 3, 1875.—[Ed.]

Hale & Bulkley, for plaintiff.

R. W. Peckham, for defendant.

WALLACE, D. J. The court has jurisdiction of this action, notwithstanding the plaintiff's assignors are citizens of this state, because this is a suit arising "under the laws of the United States" within the meaning of the act of congress of March 3, 1875, respecting the jurisdiction of circuit courts. The action is to enforce a right conferred upon the plaintiff and his assignors by section 5219, of the Revised Statutes of the United States, regarding the taxation of property in the shares of national banking associations. As was said by Chief Justice Marshall, "a case may be truly said to arise under the constitution, or a law of the United States, whenever its correct decision depends upon the construction of either," (*Cohen v. Virginia*, 6 Wheat. 379;) or where the title or right set up by the party may be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction. *Osborne v. Bank of U. S.* 9 Wheat. 822. The right of the plaintiff depends upon the construction of section 5219. If that section is meant

v.6,no.6—36

to interdict such an assessment as that of which the plaintiff complains, his right is sustained by a construction to such effect, and will be defeated by the opposite construction.

The act of 1875 employs the identical phraseology by which the constitution defines the grant of judicial power which congress may confer upon the inferior federal courts, and, I cannot doubt, is intended to confer the grant to the full extent authorized by the constitution.

Judgment is ordered for the plaintiff.

NOTE. See 5 FED. REP. 254.

LUNT and others v. BOSTON MARINE INS. CO.

(Circuit Court, S. D. New York. ———, 1881.)

1. MARINE INSURANCE — PROMISSORY REPRESENTATION — SUBSTANTIAL COMPLIANCE.

A substantial compliance with a promissory representation is sufficient to sustain a contract for marine insurance.

2. SAME—SEAWORTHINESS—BURDEN OF PROOF.

Seaworthiness must be shown by the assured, where proof of such fact is necessary to excuse the non-compliance with a promissory representation.

3. MOTION FOR A NEW TRIAL—EXCEPTION TO INSTRUCTION—SPECIFIC OBJECTION.

The failure to specify the precise point of objection, upon a broad exception to an instruction, where the latter may very possibly have had a material influence upon the verdict, will not defeat a motion for a new trial upon the ground that such instruction was erroneous.

4. MARINE INSURANCE — PROMISSORY REPRESENTATION — SUBSTANTIAL COMPLIANCE.

The cargo of a vessel which had been pronounced unseaworthy was insured upon the representation that she was "to be repaired." Upon a new survey, however, it was found that no repairs were required, and the same were therefore not made. *Held*, that the fair construction of the representation, assuming it not to have been the statement of an expectation, but a promissory representation, was that the vessel was to be put in a seaworthy condition for her voyage before the commencement of the risk; and that, if she was in that condition when she left the port from which the cargo was insured, the representation was satisfied.

5. SAME—SEAWORTHINESS—BURDEN OF PROOF.

Held, further, that the fact of non-compliance with such representation imposed the burden of proving seaworthiness upon the assured.—[Ed.]

Motion for New Trial.

Beebe, Wilcox & Hobbs, for plaintiffs.

Benedict, Taft & Benedict, for defendant.

WALLACE, D. J. The plaintiffs having obtained a verdict, the defendant now moves for a new trial, alleging error in the rulings of the court on the trial. The action is on a contract for marine insurance, evidenced by a certificate, whereby the defendant undertook to insure the plaintiffs for \$3,000 on a cargo of potatoes on board the schooner *Lacon* "at and from Yarmouth (Nova Scotia) to New York city." At the time the insurance was effected the vessel was at Shelburne, to which port she had put in leaking and in distress. A survey was ordered at that port, and the vessel was pronounced unseaworthy. By an arrangement between underwriters, who had insured the cargo, and the plaintiffs, the insurance was cancelled, and plaintiffs were paid \$2,000. They thereupon applied for new insurance to agents of the defendant. The defendant's agents refused to insure the cargo from Shelburne, but agreed to insure from Yarmouth, to which port the vessel was to proceed from Shelburne.

The action was defended upon the theory that the plaintiffs represented that the vessel should be repaired at Yarmouth, and no repairs were made; also upon the ground of concealment and of unseaworthiness.

It was not claimed upon the trial that there was a warranty in reference to the repairs, but that there was a promissory representation made orally, and in the application for insurance, that the vessel was "to be repaired at Yarmouth." Evidence was given by the plaintiffs that upon the vessel's arrival at Yarmouth a new survey was had, and it was found upon examination that no repairs were required. The court ruled that the defence of concealment could not be predicated upon the failure of the plaintiffs to disclose the fact of survey at Shelburne, or the cancellation of the previous insurance,

because the law implied a warranty of seaworthiness, and the underwriter is presumed to rely upon the warranty, and the applicant for insurance need not proffer any disclosures to the prejudice of the ship's seaworthiness, and ruled that the cancellation of the outstanding insurance was a fact extrinsic to the risk. The correctness of this ruling is not contested on the present motion. The court also ruled that if, when the ship arrived at Yarmouth and was examined, it was found no repairs were needed, and no repairs were in fact necessary, but the vessel was in a seaworthy condition for her voyage, the defendant could not prevail upon the defence of a non-compliance with the representation; that the fair construction of the representation, assuming it not to have been the statement of an expectation, but a promissory representation, was that the vessel was to be put in a seaworthy condition at Yarmouth for her voyage before the commencement of the risk; and if when she left Yarmouth she was in that condition, the representation was satisfied. To this ruling there was an exception, which is now insisted on.

There was no conflict of testimony as to the terms of the representation, and no evidence of usage respecting the meaning of the language used. It was therefore the duty of the court to decide as a matter of legal construction what was the force and effect of the representation. The representation was that the vessel "was to be repaired," without specifying the character or extent of the repairs. Nothing had been stated between the parties as to what repairs should be made. In the negotiations there had been nothing mentioned regarding the condition of the ship except that she had put into Shelburne in distress, and leaking. If the particulars of her mishap had been further specified, this circumstance might have qualified and characterized the meaning of the language used. The insurers were informed in substance that the vessel was not in a seaworthy condition. This information having been given, the insurers could not rely upon the implied warranty of seaworthiness, and insisted on an assurance that she would be repaired at Yarmouth, where the risk was to commence. The plaintiffs were not

the owners of the vessel, and could not be expected to have any voice in repairing her beyond the immediate necessities of the situation. Under these circumstances the inference seems almost irresistible that such repairs were contemplated as would render her seaworthy for the voyage, and when the insurance should take effect, and that any other repairs were a matter of indifference to the parties.

I do not understand it to be contested that if the representation was properly construed it was error to rule that there was not a breach of the representation; but if this is contended, I think the defendant cannot maintain its contention. It is not necessary to refer to the strict rules which require a warranty to be fulfilled. As to representations, more liberal rules obtain.

In *De Hahn v. Hastley*, 1 T. R. 343, Lord Mansfield said: "A representation may be equitably and substantially answered, but a warranty must be strictly complied with." The two cases most frequently referred to in illustration of the rule are *Suckley v. Delafield*, 2 Caine's Rep. 222, and *Pawson v. Watson*, 1 Cowp. 785.

In *Suckley v. Delafield*, where the representation was that the ship would sail "in a few days for the West Indies, in ballast," it was held to mean the vessel would not be exposed to the sea perils attending a loaded ship, and was substantially performed, although the master secretly conveyed into the ship and transported a small quantity of merchandise.

In *Pawson v. Watson*, *supra*, the representation was that the ship was to sail with 12 guns and 20 men. She sailed with 10 guns and 6 swivels, and with 16 men and 7 boys. It was held that as the representation had not been departed from fraudulently, nor in a manner detrimental to the underwriter, the policy was in force.

The elementary writers are unanimous to the effect that it is sufficient if promissory representations are substantially complied with. Mr. Arnould states the doctrine thus: "When it appears reasonable to conclude, from the whole circumstances of the case, that the failure to comply with the strict terms of the representation has not substantially altered

the risk, such non-compliance will not discharge the underwriter's contract." Arnould on Ins. 523. If it were represented that a vessel should sail with convoy, or a certain armament, and peace be proclaimed before the voyage commenced, it would be manifestly unreasonable to exact the performance of this representation as a condition of the underwriter's liability. Duer on Representations, 89.

In Duer on Ins. 702, (Lecture 14, § 36,) it is stated: "There exists, however, in regard to representations, this necessary exception: When they cease to be material before the risk commences, by an entire alteration in the state of things that led to their being made, and from which alone they derived their value, a compliance with their terms is no longer requisite." In the present case it is to be assumed the jury found that after an examination at Yarmouth it was evident no repairs were needed, and the vessel was in a fit condition to proceed upon her voyage. This being so, it would seem too plain to doubt that neither the interests of the insurers nor the fair purport of the promise required that to be done by the plaintiffs which would have been superfluous and futile.

It is also contended that the court erred in instructing the jury that the burden of proof was upon the defendant to establish the unseaworthiness of the vessel. If this instruction had been limited to that branch of the defence which was predicated upon a breach of the implied warranty of seaworthiness, I should be disposed to adhere to it now as correct. It is everywhere conceded that in every policy of insurance on a vessel there is an implied warranty that the vessel is seaworthy, but many of the authorities declare that this warranty is a condition precedent to the obligation of insurance; and as the general rule is undoubted that the performance of a condition precedent must be pleaded and proved whenever it enters into the cause of action, the application of that rule to actions for marine insurance seems consistent, and has therefore been enforced. On the other hand, it would seem to be the reasonable presumption of fact that a ship is seaworthy, in the absence of any circumstances

indicating the contrary; and as it is quite unnecessary to make proof of facts which will be assumed to exist in the absence of proof, it has been held in many cases that the *onus* of proving unseaworthiness is on the party that alleges it. Out of this conflict of opinion the commentators have deduced still another, which has been approved by high authority, but never adjudged when necessarily under consideration in the particular case. Mr. Justice Duer, in *Moser v. Sun Mut. Ins. Co.* 1 Denio, 176, says the true rule deducible from a full comparison of the cases appears to be that stated by Mr. Arnould, (2 Arn. on Ins. § 447, p. 1345:) "The assured is bound to aver and prove that the ship was seaworthy when the risk commenced, but the proof to be given by him in the first instance need not be particular and full. Although slight and general, if not contradicted it is deemed sufficient, and when given it shifts the burden upon the underwriter."

Mr. Phillips, after stating that seaworthiness is said to be presumed in divers cases, says: "Whether, however, it is to be proved in the first instance by the assured, or is to be presumed, is usually of very little practical importance, since the proof required in such case is necessarily only of a general character, and may ordinarily be readily had." 1 Phil. on Ins. § 724. In the present case, where the testimony left the fact in grave doubt, the unsatisfactory character of this middle view is well illustrated. The burden was on the one side or the other to overcome a presumption, either of law or of fact, and the court was required to decide where the burden rested; and in a doubtful case like this the ruling might well be decisive with the jury. If the *onus* is shifted from the plaintiff to the defendant, when the former has given "slight and general proof" of seaworthiness, it would seem to be shifted back again when the latter has given proof which is more cogent, and thus the court would be required to determine a question of fact upon conflicting evidence before instructing the jury upon a question of law. It is a safer rule, because capable of a more certain application, to hold that the one party or the other has the *onus* of proof.

There are two cases in the federal courts which are entitled

to great consideration, because of the learning and eminence of the judges before whom they were tried, where the question was directly considered, and instructions to the jury were delivered; but, unfortunately, they are in direct antagonism. Mr. Justice Story, in *Tedmarsh v. Wash. Ins. Co.* 4 Mason, 440, instructed the jury that the burden of proof to establish seaworthiness was upon the assured, while Mr. Justice Curtis, sitting in the same circuit, in the later case of *Bullard v. Roger Williams Ins. Co.* 1 Curtis 148, instructed the jury that the burden of proof was upon the insurer. The English cases favor the conclusion that seaworthiness is assumed as a fact, in the absence of countervailing facts, and therefore that the assured is entitled to the benefit of the presumption. *Watson v. Clark*, 1 Dow, 336; *Parker v. Potts*, 3 Dow, 23. And in the recent case of *Peckup v. Thames Ins. Co.*, decided by the high court of appeals in 1878, (L. R. 3 Q. B. Div. 594,) all the judges agree that the presumption of law is *prima facie* in favor of seaworthiness, and the burden of proof to the contrary is on the insurer. That was an action on a policy, and it was proved on the trial that the vessel put back from inability to proceed 11 days after she started on her voyage. The judge directed the jury that this circumstance was sufficient to shift the *onus* of proof from the underwriter, and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail. This was held to be error, all the judges agreeing that the presumption is *prima facie* in favor of seaworthiness, and the burden of proof to show the contrary upon the insurer. The same conclusion is sanctioned by the weight of authority in our own courts. *Taylor v. Lowell*, 3 Mass. 347; *Paddock v. Franklin Ins. Co.* 11 Pick. 227; *Myers v. Girard Ins. Co.* 26 Pa. 192; *Snethen v. Memphis Ins. Co.* 3 La. Ann. 474.

In the present case, however, the jury were instructed that the burden of proof was upon the defendant to show unseaworthiness when it appeared that the plaintiffs had represented that the vessel should be repaired at Yarmouth, and no repairs had in fact been made. It thus appeared there

had not been a compliance with the representation, and it then devolved upon the plaintiffs to excuse their non-compliance. This they attempted to do by proof that the vessel was seaworthy and needed no repairs. The plaintiffs held the affirmative as to this. The instruction imposed the affirmative upon the defendant. The manifest tendency of the instruction was to mislead the jury. Had my attention been specifically directed on the trial to the point now made, the instruction would have been limited to the issue arising upon the implied warranty of seaworthiness. As it was, a broad exception was taken to the instruction, which would probably be unavailing upon a bill of exceptions for failure to specify the precise point of objection. But on a motion for a new trial, and when the misdirection may very possibly have had a material influence upon the result, a technical criticism of the exception is out of place.

The motion for a new trial is granted.

STEIGER and others v. THIRD NATIONAL BANK.

(Circuit Court, E. D. Missouri. April 18, 1881.)

1. FACTOR—PLEDGE OF GOODS—STATUTES OF MISSOURI.

Under the statutes of Missouri a factor is not authorized to pledge the consignor's goods for an amount beyond the sum of the advances and charges thereon.

2. SAME—CONVERSION—TENDER.

In such case a tender of the advances and charges must first be made by the consignor before suit can be maintained for the conversion of the goods.—[ED

Demurrer to Answer.

George A. Madill and Henry E. Mills, for plaintiff.

Overall, Judson & Tutt, for defendant.

TREAT, D. J. The plaintiffs aver that they shipped certain chattels (described) to their factors in St. Louis for sale; that said factors, without plaintiffs' consent, pledged the same to the defendant, with full knowledge on the part of the defend-

ant that the pledgors were plaintiffs' factors, and that said chattels were the property of the plaintiffs, and that the plaintiffs demanded of the defendant the delivery to them of said property, which was refused. These averments are followed with the formal charge of conversion.

The *answer* states that the plaintiffs were indebted to their factors for charges and advances on the specific chattels, without stating the amount thereof; that said chattels had been deposited in a warehouse, and a warehouse receipt therefor given to the factors; that said factors pledged to the defendant said chattels and warehouse receipt in order to raise means to pay said charges and advances; and that the defendant, "on the faith of said goods and chattels and warehouse receipt, duly indorsed by the factors, loaned to said factors \$10,557.37, which sum is still due and unpaid." The answer does not aver that said sum loaned was the amount of advances, etc.

The second defence is that the defendant did not know, etc., that, as to said chattels, the plaintiffs were owners or consignors thereof, and that the pledgors were factors merely; but, on the contrary, that said alleged factors, having the warehouse receipt, and the defendant believing said factors to be the owners, the defendant did, "on the faith of said receipts," etc., loan said sum of money to said factors, whereupon said chattels were transferred to the defendant, and said warehouse receipt indorsed and delivered.

The demurrer is to the first and second specific defences, as stated. The *first* is designed to raise the question whether a factor cannot, under the Missouri Statutes, assign a warehouse receipt, and pledge the chattels to raise money for advances and charges to an indefinite amount, even if the pledgee knows the factor's relation to the property. If not so, the amount of said advances and charges ought to have been stated, so that it would appear whether the pledge was for a larger sum than the factor's lien. Is it intended to assert that if advances and charges exist, or are about to be created, the factor may pledge *generally*, even when the pledgee knows the precise relation of the factors to the property?

The second defence raises the question whether a party receiving an assignment of a warehouse receipt, believing the assignor to be the owner of the property, cannot hold the same against the real owner for the amount loaned on the faith thereof, irrespective of the state of the accounts between consignor and consignee.

A full review of the subject would be advisable, if time permitted, requiring an analysis of the various decisions and the statutes under which they were made; but such a review would compel a consideration, not of elemental principles alone, but of their modifications through English and American statutes, in the light of judicial interpretation of the respective statutes; such a review looking to the true interpretation, persuasively, of the Missouri Statutes.

In 18 Missouri, 147, 191, the true doctrine of the common law was stated and enforced, to-wit, that a factor could not pledge his principal's goods. Prior to that time, both in England and in some of the American states, the rigorous and just rule at common law had been modified to a greater or less extent.

The Missouri Statutes of 1868, 1869, and 1874 are in accord. Thus the act of 1868 authorized the transfer of a warehouse receipt by indorsement thereon, whereby the transferee is to be deemed the owner of the goods, "*so far as to give validity to any pledge, lien, or transfer made,*" etc.: *provided*, that if the words "non-negotiable" were written or stamped on said warehouse receipts, etc., the act would not apply. This statute, with the exception in the proviso mentioned, permitted a transfer by indorsement of a warehouse receipt, *so far as to give validity to the pledge, lien, and transfer*. Prior to that act, as had been decided by the Missouri supreme court in the two cases *supra*, no such pledge could be made. The act of 1868 authorized the pledge in the manner stated to the extent of the factor's lien. Section 6, Act of March 13, 1868.

But it is contended that section 10 of said act gives a broader effect to such transfers, for it provides that ware-

house receipts, etc., "shall be negotiable in blank, or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes now are." Was this section designed to cut off all equities between consignor and consignee, when a transfer of the receipt had been made to an innocent transferee for value? If so, were demand on the principal and notice to the indorser required to hold the parties to said receipt personally liable for property for an undetermined value, not like bills of exchange, etc.? Or was it designed to effect merely a valid pledge of the property, through indorsement of the receipt, without a personal liability on the part of the warehouseman for more than the specific property?

It is obvious that if the warehouse receipt was to operate as a bill of exchange the primary element of such a bill would be eliminated, viz., a *sum certain*; and also demand on the warehouseman at maturity would be required, with due notice, as by the law merchant. But the warehouse receipt may not fix a day certain on which delivery is to be made, nor does it contain any other of the essential requisites of a bill of exchange, whereby the law merchant can fasten on the parties to the paper their respective liabilities. The original contract was between consignor and consignee. The latter received the goods to sell for the benefit of the consignor. Could he, without consent of the consignor, place the same in a warehouse, and then turn over the warehouse receipt to some other person, and thus convert a contract resting in personal confidence and trust for the sale of the property into a general authority to any and every one to whom the receipt might be pledged, or who thus gets manual or symbolical possession of the property, to sell the same, with or without accounting to the consignor for the proceeds thereof? To so hold would be subversive, not only of all rights of property, but of all laws of contract between consignor and consignee. Does, then, the clause in the statute as to *negotiability* imply or require any such overturn of *elemental* principles? Was the contract between consignor and consignee assigned, as well

as rights of property? As will be seen hereafter the United States supreme court has determined the true meaning of the term employed in this and like statutes.

The act of 1868 (Missouri Statutes) denounces penalties against a factor who does not account for or pay over to his principal the amount received on the negotiation, pledge, etc., of goods consigned. Does that imply that a negotiation or pledge may be made by the factor for more than his lien, he alone to be answerable for the surplus, and that the pledgee may not be also held for the surplus? Is not that section intended not to exonerate the indorser or transferee from liability to the consignor, but to add to the consignor's security those penal provisions? The Missouri act, March 4, 1869, repeats the provisions of the act of 1868, *supra*, as to *negotiability*, and in section 2 declares that the indorsee of the receipt shall be deemed the owner of the goods, "so far as to give validity to any pledge, lien," etc., "*as on the faith thereof*," with the same proviso as in the former act. The repeal of certain sections in the former act does not affect the present inquiry further than is needed to interpret the force and effect of the terms, "*as on the faith thereof*." Does the insertion of these words *enlarge* or *restrict* the rights of the indorsee? By the prior statute the simple indorsement caused the indorsee of the receipt to be deemed the owner, so far as to give validity, etc.; but it must have appeared to the legislature that such a provision left the door to fraud wide open, and hence in the act of 1869 the relationship of the indorsee seeking the benefit of the transfer was confined to a *bona fide* indorsee; or, in the language of the act, to a transfer, pledge, etc., made "*on the faith*" of the warehouse receipt. Such being the condition of the statutes, the act of March 28, 1874, was passed, evidently designed to punish fraudulent factors and warehousemen, restricting their negotiations and pledges of bills of lading and warehouse receipts to cases where the owner or consignor gives *written authority* therefor; whence the proviso to the act, which is in the following words: "*Provided*, that nothing herein shall be construed to prevent such consignee or other person lawfully possessed of such bill of

lading or warehouse receipt from pledging the same to the extent of raising sufficient means thereby to pay charges for storage and shipment or advances drawn for on such property by the owner or consignor thereof, and a draft or order by the owner or consignor thereof; and a draft or order by such owner or consignor for advances shall be held and taken to be 'written authority,' within the meaning of this section, for the hypothecation of such bill of lading or warehouse receipt to the extent, and only to the extent, of raising the means to meet such draft, and to pay such freight and storage." Under this penal act the only question presented is whether a pledgee is deprived of his rights as such pursuant to prior acts, unless written authority from the owner or consignor by draft, order, or otherwise is presented to him at the time of pledge made; or whether the pledge made without such written authority merely imposes upon the factor the penalties denounced, without invalidating the transfer.

It cannot be disputed, in the light of the decisions *supra*, 18 Mo. Rep., (which were in full accord with settled principles,) that a factor could not pledge for his debt the goods of the principal. Such being the received doctrine in England and America, an act of the British parliament was needed to modify the rule as to Great Britain, and acts by several states in this country more, or less in accord with the acts of George IV. The first and most important inquiry is as to the force of the statute concerning the negotiability of warehouse receipts, etc.

In the case of *Shaw v. R. Co.* 101 U. S. 557, the doctrines involved were fully considered; the statutes under consideration by that court being those of Missouri and Pennsylvania, which were, in this respect, declared to be alike. After a very full and clear exposition of the question concerning negotiability as applied to bills of exchange and bills of lading, respectively, the court said: "It cannot be, therefore, that the statute which made them (bills of lading, etc.) negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change wholly their character, put them in all

respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law further than its words import."

This case is not only very instructive, but authoritative on this court; certainly, in the absence of any interpretation of the Missouri statute by the supreme court of Missouri. The general doctrine as to consignor and consignee, when advances have been made or not made, are fully stated in the opinions of the United States supreme court, 14 Pet. 479, (*Brown v. McGraw*), and in 11 How. 209, (*Warner v. Martin*.)

In 23 Wall. 35, (*U. S. v. Villanoga*), the extent of a factor's interest and control of the property is stated.

Another question arises concerning the right of the consignor to maintain his action against the factor or his assignee for the value of the goods, or their commission, when advances, charges, etc., exist, without first tendering the amount of said advances. On this point the authorities are not in accord. Some hold that the consignor may sue for the full value of the goods, as in trover, and the defendant may recoup as to advances and charges, whereby the consignor would recover the surplus to which he is entitled and no more. Other authorities hold that inasmuch as the assignee of the factor holds the property under a lien for advances, etc., the consignor has no right of action until the lien is first removed, except as in *assumpsit* for the surplus. It is useless to review these differing authorities in the light of technical rules, which are now to a large extent obsolete. It is clear that the factor has, in Missouri, a right to pledge the goods consigned to the extent of the advances and charges thereon,

and we now hold that he can pledge them no further. If, then, such be his legal right, a suit cannot be maintained on any recognized principle, either against the factor or his pledgee, for the conversion of said goods, unless, after tender and demand, a refusal is made.

Prior to the Missouri Statutes, the United States supreme court declared, in *Warner v. Martin*, *supra*, that whilst a factor could not pledge for a debt of his own, and if so pledged the consignor could recover in trover against the pledgee without tender either to the pledgee or factor what might be due to either of them, because the pledge was tortious; still a factor who had a lien on the goods could deliver them to a third person as security to the extent of his lien, in which case a tender of the amount of the lien due the factor must be made before recovery could be had. The opinion of the United States supreme court in that case throws much light on this controversy; for, if the contention is that under the Missouri Statutes a factor may pledge his principal's goods on the faith of a warehouse receipt, irrespective of the amount of his advances and charges,—that is, for any amount he can borrow on the faith of a warehouse receipt,—it becomes important to ascertain if such a doctrine, subversive of the ordinary rights of principal and agent, or consignor and consignee, has any sanction either in statute or otherwise.

In *Warner v. Martin*, *supra*, a similar view seems to have been urged, and reliance was had on the act of Geo. IV., c. 94, (1825,) the English factor's act. The United States supreme court, having before it both the English and the New York acts, said: "The third section of that (the New York) act provides for those cases where the ownership by the factor of goods which he contracts to sell shall be said to exist, to give protection to purchasers against any claim of the factor's principal. [This is a contract of sale.] It is when he contracts for any money advanced, or for any negotiable instrument or other obligations in writing given for merchandise upon the faith that the factor is the owner of it. The concluding words of the section are, 'given by such other

person upon the faith thereof.' Three misconstructions of that act have been prevalent, but they have been corrected by the courts of New York. We concur with them fully. One was that the statute altered the common law so as to give validity to a sale made by the factor for an antecedent debt due by him to the person with whom he contracts; another, that the statute gave to a purchaser protection whether he knew or not that the goods which the factor contracted to sell him were not the factor's, and belonged to the principal; and the other, that the concluding words, 'upon the faith thereof,' related to the advance made upon the goods, and not to the property which the factor had in them."

Without pursuing these inquiries further, it is held that a factor may, under the Missouri Statutes, pledge his consignor's goods to the extent of advances and charges thereon; the advances to be evidenced as required, and to no greater extent. It may be urged that a practical difficulty will arise in ascertaining the correct amount of advances and charges; but if that be so, the consignor may reply with greater force that his property ought not to be pledged for more than the factor's lien thereon. The pledgee is not obliged to loan money and receive the pledge as collateral. If he is willing to lend to the factor he can receive as collateral a warehouse receipt to the extent that the factor has a lien on the goods represented; in other words, the factor can pledge what belongs to him,—his lien,—and not his principal's interests or rights of property. This may be questionable legislation, inasmuch as it enables the pledgee to sell the goods if not redeemed, instead of the agent, in whose personal skill and judgment alone the consignor confided.

If there were advances and charges existing for which the property was pledged, the plaintiffs, to recover in trover or for conversion, should have first tendered the amount thereof. In no event are they entitled to more than the surplus after the lien is discharged.

Here arises the difficulty under which courts and legislatures have labored with respect to the common-law rule and needed modifications thereof. A consignor selects his con-
v.6,no.6—37

signee, on whose skill and personal integrity he relies for a judicious sale of the property consigned. If the consignee advances on the shipment, at the close of the transaction the consignor is entitled to receive the proceeds of the sale, less advances, charges, and commissions. But if the consignee is permitted to pledge the consignor's property to the amount of advances and charges, and the pledgee controls the sale of the property,—it may be at forced sale, irrespective of the condition of the market, etc.,—the consignor's right may be sacrificed, his reliance on the personal judgment and skill of his consignee set at naught, and another and injurious mode of disposing of his property pursued—a mode never contemplated by him. Still, if such a mode is lawful, he is compelled to submit thereto. How, then, shall he be bound, as in favor of the pledgee, for advances? or, in other words, to what evidence of advances made or to be made shall the pledgee be confined? The act of 1874, *supra*, gives the rule. There must be written authority for advances, and a draft or order drawn by the consignor against the shipment is to be considered such written authority. It is thus under statutory safeguards that the consignor may make his shipments. He knows that his consignee may pledge for charges, but cannot pledge for advances without written authority, as by draft or order. Hence, justice is wrought. Unless he receives an advance, or by written authority orders such to be made, his property cannot be pledged therefor. It is very easy for the pledgee to call for the written authority, such as the statute requires, and if he takes a pledge from the factor for supposed advances, when no written authority exists, he cannot hold the property therefor against the consignor's rights.

The decisions in Wisconsin and elsewhere, looking to different conclusions from those reached by this court, have received careful consideration. There is nothing in the Missouri Statutes to justify a factor's pledge for more than advances and charges, and the evidence of advances is confined to written authority therefor. A factor cannot sell or pledge for his individual debt, but he can sell to pay such advances and charges, or pledge therefor, or sell in the usual course of

business, irrespective of advances and charges. The protection of the consignor requires the enforcement of the statutory rules, which, as existing, are a relaxation of the common-law doctrines, and ought not to be construed to extend beyond their clear import.

If a stranger will take a pledge of goods from a factor without inquiry, the consignor is not to suffer. Whether he knows or not that the person from whom he takes the pledge is a mere factor does not change the rule. A consignor's property cannot be taken from him without his consent. A pledgee is bound, at his peril, to inform himself of the facts. The rule as to *sales* in the ordinary course of business is one thing, and as to *pledges* entirely different. This is fully stated in the case of *Shaw v. Railroad Co.*, *supra*. The difficulty, as heretofore intimated, arises from the failure of defendant to aver the amount of advances and charges for which the goods were pledged. The answer states that there were advances and charges, and that, for the purpose of raising means to pay the same, the warehouse receipts were pledged, and that defendant loaned "on the faith thereof" \$10,555.31. If it be meant that the sum loaned was the amount of charges and advances, the defence is good, in the absence of a tender thereof; but if, on the other hand, it is meant that inasmuch as there was some amount due, however small, the factor could pledge the property for any loan he might obtain thereon, however large, and hold the property against the consignor generally, that special defence would be bad.

The only difference between the two special defences seems to be that in one it is averred that the defendant believed the pledgor to be the owner, and in the other no such averment is made. As already stated, such a difference avails nothing. The defendant, in his argument, says: "The question presented for the consideration of the court is this: If a factor pledges the bill of lading or warehouse receipt, having no reason to doubt that such factor is the true owner of the goods, can the consignor recover the goods without first offering to return the money borrowed?" It will be apparent, from what

has heretofore been observed, that the proper answer to such question, thus broadly stated, would be in the affirmative. The factor cannot pledge the goods of his principal, except to the amount and in the manner stated. He has no authority, either at common law or by statute, to borrow money generally on the pledge of the warehouse receipt; nor can the pledgee protect himself against the demand of the consignor, except to the extent of such advances and charges. The pledgee may receive a transfer of the factor's lien, and nothing more. Hence, the answer being that advances and charges were due, (the amount not stated,) and that a loan was made to the factor, irrespective of the amount of said advances and charges, nothing definite is presented, unless, as stated in argument, that there was a valid pledge for the amount loaned on the faith of the receipt. Such a defence is not valid, and the demurrer thereto will be sustained.

The same ruling will be had as to the second special defence. If, however, the defence, if amended, should show that defendant was pledgee for advances and charges within the term of the Missouri Statutes, and that no payment or tender thereof was made before suit brought, then said defence as to this form of action will be valid. In other words, a pledgee can maintain his pledge only for what the statute provides, and in the manner provided. If he brings himself within the terms of the statute, then as lienor he is not a tort-feasor, or guilty of conversion by refusing to surrender the property until the lien is discharged.

Demurrer sustained.

BLAKEMORE, MAYO & Co. v. HEYMAN.*(Circuit Court, D. Kentucky. April 5, 1881.)***1. COMMERCIAL USAGE—GENERAL LAW.**

In order to have a commercial usage take the place of the general law, it must be so uniformly acquiesced in, and for such a length of time, that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract.

Lyons v. Culbertson, 83 Ill. 37.

2. SAME—NEW YORK COTTON EXCHANGE.

Therefore, the laws, rules, and regulations which govern the members of the New York cotton exchange can have no effect upon the legal rights of a party to a contract, who did not know of or acquiesce in the same.—[Ed.]

Henry Burnett, for plaintiffs.

Gilbert, McGonagill & Reed, for defendant.

BARR, D. J. This is a suit to recover a balance of \$687.19, which plaintiffs alleged they paid for defendant at his instance and request. Plaintiffs are commission merchants, doing business in New York, and are members of the cotton exchange of that city. They deal in produce on commission. Defendant is a dry goods merchant, doing business in Henderson, Kentucky. Plaintiffs bought on the cotton exchange, New York, for defendant, 100 bales of cotton, to be delivered February, 1879. This contract matured, and they say they closed it out according to the rules and regulations of the cotton exchange, and there was a loss of \$44.75. They, at the request of defendant, sold March 24, 1879, for his account, 100 bales of cotton, June delivery. They sold March 26, 1879, upon like request and account, 100 bales of cotton, July delivery. These sales were made on the cotton exchange, and at the prevailing rates. Plaintiffs then had in hand as margin \$660, less the \$44.75 loss on the purchase of 100 bales of cotton for February delivery.

The market advanced, and plaintiffs demanded of defendant additional margin, and he sent them, April 1, 1879, \$75, and promised, April 3, 1879, to send them \$300 more, but failed to do so. The plaintiffs, on the fifteenth of April,

1879, covered these outstanding contracts by the purchase, from two members of the cotton exchange, of the same amount of cotton, and same delivery, June and July. The cotton thus purchased cost more than the price for which the cotton was sold in March. The difference was settled as of the fifteenth of April, and the contracts which were entered into April 15th substituted for the March contracts, and thus the transaction was closed, and plaintiffs released from any further liability. The loss on the contract for the June delivery was \$679.25, and on the contract for the July delivery was \$578.25. These sums, together with the plaintiffs' commission, after deducting the margin in their hands, made the balance of \$687.19 sued for.

The defendant admits the employment of plaintiffs and the sending of the margins to them, but puts in issue every other material allegation of the petition. He denies that there was a sale in March of the cotton, as alleged, or that there was a purchase in April. He denies all knowledge of the rules, regulations, or customs of the New York cotton exchange. He also alleges that any contract or contracts which plaintiffs entered into were with the express understanding that only the difference should be paid, and that they were really only wagers upon the rise and fall of the market, and void.

I have carefully read the evidence, and need only consider whether or not plaintiffs had the right to close out the June and July deliveries on the fifteenth of April, because defendant failed to put in their hands the margins required by them of him.

There is no evidence proving or tending to prove that there was a special agreement between the parties which authorized the plaintiffs to close out these contracts in advance of their maturity, because of the failure of defendant to put up margins to cover the fluctuations of the cotton market in New York. This right is sought to be derived from the rules and regulations of the New York cotton exchange, and the custom prevailing in the New York cotton market. All knowledge or notice of the rules and regulations of the New York cotton

exchange is denied by defendant, and he reiterates these denials in his testimony.

The plaintiffs have failed to prove defendant's knowledge of these rules and regulations, or that he agreed to be bound by them in his dealings with plaintiffs, or that the contract between plaintiffs and defendant was to be controlled or governed by them.

Indeed, there is no affirmative evidence upon this subject other than the fact that the dealings were upon margins, and that defendant seemed to have recognized plaintiffs' right to call for additional margin. But, as far as I can see from the evidence, never at any time has defendant waived his legal rights in the event he failed to put up margin as required by plaintiffs. In the absence of an agreement plaintiffs had no legal right to close out contracts on the fifteenth of April which did not mature until June and July.

The laws, rules, and regulations which govern the members of the New York cotton exchange can have no effect upon defendant's legal rights, as he did not know of or acquiesce in them. If, however, it be conceded that defendant is bound to repay to plaintiffs all losses which they incurred in accordance with the laws and rules governing the New York cotton exchange, I should be disinclined to give judgment in favor of plaintiffs, because it is not shown they were compelled to do what they did. The parties to whom they allege they sold the cotton were Waldo & Dayton, plaintiffs' brokers, and they nowhere prove that Waldo & Dayton required of them more margin than defendant had already furnished them, nor, indeed, that any demand for margin had been made of them, or would be made.

Plaintiffs' call for an additional margin was, as far as this record shows, made for plaintiffs' own protection, and not because margins had been demanded of them.

In regard to a custom in New York outside of the cotton exchange, which Mr. Watts, president of the cotton exchange, attempts to prove, it is sufficient to say that no such custom is pleaded, nor is there any evidence tending to prove defendant's knowledge of it, or that it is a well-known usage

or custom. In order to have "commercial usage take the place of general law it must be so uniformly acquiesced in, and for such a length of time, that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract." *Lyons, etc., v. Culbertson*, 83 Ill. 37.

The plaintiffs have failed to sustain their action, and judgment will be for defendant and his costs expended herein.

MANSFIELD, FREESE & Co. v. DUDGEON & GORDON.

(Circuit Court, W. D. Michigan, S. D. November 26, 1880.)

1. NEW TRIAL—SURPRISE AND NEWLY-DISCOVERED EVIDENCE.

Motion for new trial upon the grounds of surprise and newly-discovered evidence granted under the circumstances of this case, where the same was not brought to a hearing until after the expiration of 11 years from the time it was entered.—[Ed.]

Assumpsit. Motion for New Trial.

E. S. Eggleston, for plaintiffs.

Chas. H. Stewart and Hughes, O'Brien & Smiley, for defendants, on the argument of motion.

WITHEY, D. J. In November, 1869, this cause was tried and a verdict for plaintiffs rendered for over \$6,000. A motion for a new trial was then entered, but has never been brought to a hearing until now, after eleven years have expired. Ordinarily such delay would be sufficient reason for dismissing the motion, for without very good grounds for justification no party ought to be forced to retry his case at so remote a day that it may be presumed difficult to obtain the evidence given upon the former trial. But the fact that defendants' attorney, soon after the trial, became and continued seriously ill for a long period, and became a confirmed invalid, unable to attend to the ordinary duties of an attorney, operates as some excuse for delay. It appears, also, that two of the plaintiffs, Mansfield and Freese, were, in 1872, adjudicated bankrupts, and that their assignee has never entered an

appearance in the case; and, finally, that Mansfield died not long after his bankruptcy. There has been no attempt to move in the case by either party until proceedings were taken a short time since in behalf of surviving plaintiffs to enter judgment on the verdict, which was met by this old motion for a new trial.

The grounds of surprise and newly-discovered evidence are the principal and only ones I shall consider, and I am of opinion, under the circumstances, that the question whether these grounds are sufficient should be regarded as if the motion had been heard within a month after it was entered. The question turns upon whether the newly-discovered evidence ought, by diligence, to have have been discovered before the trial, and whether it is of sufficient importance to probably change the result upon another trial. The corn which is the subject of the suit, and which plaintiffs sold and delivered to defendants under a contract, had most of it arrived at Cairo, Illinois, on the eighteenth of April, 1865, and was intended to be sold at that place by defendants to the general government, and be inspected by government inspectors. Defendants did not pay in full for the corn, as agreed; they claimed part of it was not sound and merchantable, and this suit was for the price of the unpaid portion, or that which they alleged to be unsound corn. Defendants relied upon showing as a defence that they and plaintiffs, at St. Louis, on the eighteenth of April, 1865, came to an understanding and agreement that defendants were to pay for the sound, but not for the unsound, corn; and that what was unsound was to be determined by what was rejected by the government inspector at Cairo. They testified on the trial that such was the fact, and that an order was given by them to plaintiff Mansfield, on the freight agent of the Illinois Central Railroad at Cairo, to deliver the rejected corn to warehousemen, for plaintiffs' disposition. Mansfield, on the trial, denied any such agreement, or any such order had been given. The preponderance of evidence was on the side of plaintiffs, in the opinion of the the jury, and the verdict was for them.

After the trial defendants discovered that plaintiffs and a

warehouse firm at Cairo had corresponded on the subject of the corn in question, and subsequent to the eighteenth of April, 1865, viz., the latter part of that month; and on this motion placed on file an original letter, in Mansfield's handwriting, which shows clearly that defendants did give an order to Mansfield, prior to the twenty-seventh of April, 1865, touching the corn in question, and its delivery by the freight agent of the railroad to warehousemen at Cairo. There is no way of determining its precise import, but, *prima facie*, it is the one testified to by defendants on the trial, and if it had been produced in evidence, must, we think, have changed the verdict. Defendants, prior to the trial, gave notice to plaintiffs to produce the order of April 18, 1865, after having applied to the railroad freight agent at Cairo for it, and been by him informed that he had received no such order. Defendants, therefore, had a right to believe that plaintiffs still held it, and that a notice to produce would secure it at the trial. They had no reason to suppose that plaintiffs had sent the order to a warehouseman at Cairo, as it was addressed to the freight agent of the railroad, and therefore were surprised at the trial by its non-production, and by the testimony of Mansfield wholly denying that he had received such order, or knew anything about one having been given. He did know an order touching that corn had been given. He knew that he had held it, and had transmitted it by letter to Halliday Brothers, warehousemen at Cairo, and that it was drawn on the freight agent and was made by defendants. It is manifest that the order was for the delivery of the corn in question to Halliday Brothers, if we look at their letters in reply to Mansfield of date respectively April 25 and 27, 1865, for in them Halliday Brothers object to receiving the corn on plaintiffs' account. Mansfield gave no intimation that there was any order whatever, denied the existence of one, and gave the court and jury to understand that defendants' testimony on that subject was altogether and entirely untrue. If the order was not of the precise nature or import testified to by defendants, and yet an order was given at St. Louis April 18, 1865, the jury was entitled to know that fact, and

it could not have failed to exercise considerable influence, especially if plaintiffs, knowing who held it or to whom it was by them sent, failed to produce it or show that they had tried to do so. Defendants applied after the trial to Halliday Brothers, who could not find the order, but gave them the correspondence alluded to between themselves and plaintiffs, and their affidavit. The new testimony is regarded as not only material, but of a character to have prevented a verdict for plaintiffs; and it is not seen how defendants can be said to have been otherwise than surprised on the trial by the non-production of the order, or of information of its whereabouts, and plaintiff Mansfield's testimony wholly denying the existence of any order of the kind. Mansfield's death ought not to be a sufficient reason for perpetuating a verdict thus obtained.

A new trial is granted, but on the terms that defendants pay the taxable costs of the trial.

In re HYDE, Bankrupt.

In re KING, Bankrupt.

(Circuit Court, S. D. New York. March 28, 1881.)

1. BANKRUPTCY COURT—POWER TO SET ASIDE FRAUDULENT DEEDS.

The district court has power, while sitting in bankruptcy and exercising the jurisdiction conferred by the bankrupt law of 1841, by summary order, to set aside and order to be surrendered and cancelled deeds given by the official assignee, which are improvidently, irregularly, or without due authority executed by him, or which were procured to be executed by imposition and fraudulent practices upon the court, or which were designedly so drawn as to be grants in excess of or varying in material particulars from the orders of the court under which they purport to be executed, while the same are still in the hands of the party by whom they were so procured from the assignee, and who had notice of said irregularities and defects, and who gave no value therefor, except certain sums paid to the official assignee as fees, upon the petition of a party not a creditor of the bankrupt, and having no interest in the matter, except that he is in the possession of land, claiming title thereto, and that he has been subjected to liti-

gation, or is threatened with litigation, in respect to said land, based upon the deeds sought to be avoided, after the discharge of the bankrupt, and when there are no longer any known assets to be distributed among creditors.—[Ed.]

Wm. Allen Butler, for petitioners.

Geo. F. Betts, for respondents.

BLATCHFORD, C. J. It was provided by section 6 of the bankruptcy act of August 19, 1841, (5 St. at Large, 445,) that "the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined, and for this purpose the circuit court of such district shall be deemed always open." Under this provision the following question has been adjourned into this court by the district judge of this district, as a question arising in the above-entitled cases, which are cases in the district court for this district, in bankruptcy, under the said act, to be here heard and determined: "Whether the district court has power, sitting in bankruptcy and exercising the jurisdiction conferred by the bankrupt law of 1841, by summary order, to set aside and order to be surrendered and cancelled deeds given by the official assignee, which were improvidently, irregularly, or without due authority executed by him, or which were procured to be executed by imposition and fraudulent practices upon the court, or which were designedly so drawn as to be grants in excess of or varying in material particulars from the orders of the court under which they purport to be executed, while the same are still in the hands of the party by whom they were so procured from the assignee, and who had notice of said irregularities and defects, and who gave no value therefor, except certain sums paid to the official assignee as fees, upon the petition of a party not a creditor of the bankrupt, and having no interest in the matter, except that he is in the possession of land, claiming title thereto, and that he has been subjected to litigation, or is threatened with litigation, in respect to said land, based upon the deeds sought to be avoided. Whether this power, if it can be exercised at all, can be exercised after the discharge of the bankrupt, and

when there are no longer any known assets to be distributed among creditors."

The question adjourned must be taken to be based on the facts asserted in the statement of the question: (1) That deeds of land were given by the official assignee, purporting to be executed under orders made by the district court; (2) that the deeds were executed by the assignee improvidently, irregularly, or without due authority; (3) that the deeds were procured to be executed by the assignee by imposition and fraudulent practice upon the court; (4) that the deeds were designedly so drawn as to be grants in excess of, or varying in material particulars from, the said orders; (5) that the deeds are still in the hands of the party who so procured them from the assignee; (6) that the said party had notice of the said irregularities and defects; (7) that the said party gave no value for the said deeds except certain sums paid to the official assignee as fees.

On the foregoing facts the questions to be considered are— (1) Whether the district court, sitting in bankruptcy, and exercising the jurisdiction conferred by said act, has power, by summary order, to set aside said deeds, and power also to order them to be surrendered and cancelled; (2) whether it can do so on the petition of a party who is not a creditor of the bankrupt and has no interest in the matter except that he is in the possession of land, claiming title thereto, and that he has been subjected to litigation, or is threatened with litigation, in respect to said land, based upon said deeds; (3) whether it can do so after the discharge of the bankrupt, and when there are no longer any known assets to be distributed among creditors.

The order of adjournment shows that the question was adjourned on the application of the respondent holding the deeds referred to, and that he appeared by counsel before the district court. He appears in this court by counsel, who urges that the inquiries made should be answered in the negative. It is contended that the inquiry is not as to the inherent power of the district court to grant the relief referred to, under the facts stated, but is as to its power to do so on

the petition of such a party as the one specified; that such party is not legally entitled to call on the respondent to answer; that such party is a stranger, and has no right to intervene, not being a creditor, and having no interest in augmenting the fund, or in its distribution; and that the discharge of the bankrupt and the non-existence of assets for distribution amount to a close of the proceedings in bankruptcy, and terminate the power of the court in bankruptcy over the case.

Before adjourning the above question the district judge expressed his views in a written decision on the question. He held that the party applying had such an interest in the matter that he could maintain the petition; that he was not a mere stranger, asking to have the act vacated on grounds of public policy, but appeared as a party whose rights were injuriously affected by the act of the officer of the court; that the court had power to relieve him if he made out his case; and that the proceeding in bankruptcy had not reached its final consummation so long as there remained any order, decree, or action for the court, in the proper and usual exercise of the jurisdiction in like cases, to enter or to take, or any redress or relief to be given to any party or person properly applying to the court therefor in the case.*

The inherent power exists in every court to set aside a deed which its officer has given, gratuitously and without consideration, for no value except a fee to the officer, where the deed was given improvidently, irregularly, or without due authority, or where the deed was procured to be executed by imposition and fraudulent practices on the court, or where it was designedly so drawn as to be a grant in excess of, or varying in material particulars from, the order of the court under which it purports to be executed, while the deed is still in the hands of the party who procured it from the officer, such party having procured it under the circumstances above stated, and having notice when he so procured it that the irregularities and defects above referred to existed.

There is no good faith in such a transaction; no purchase,

*See *In re Hyde*, 3 FED. REP. 839.

no vested right. The right of a *bona fide* purchaser without notice has not intervened. There has been a wilful wresting of the action of the court by unlawful means, and the person who was a party to and an actor in the transaction cannot be heard to claim that he can profit by the transaction, or that the court should not be allowed to re-instate itself in the position in which it was before the unlawful transaction took place. The power existing to set aside the deed and treat it as if it had never been executed, to sweep it away as a cloud on the title of the court and its officer, to restore the integrity of the action of the court and its officer, does not detract from the vigor or efficacy of the power that it is set in motion by a person against whom the deed operates injuriously. No one is ever likely to complain of the wrongful act, except a person aggrieved thereby. A person in the possession of land, and claiming title thereto, and who has been sued, or is threatened to be sued, on the deed, in respect to such land, has a sufficient interest in the matter to require the holder of the deed, holding it under the circumstances stated, to answer an application to the court, made by such person, to set aside the deed. Of course this is to be done on a proper petition by such person, with an opportunity to the holder of the deed to answer it, and to meet the proofs of the applicant, and to put in proofs himself, according to the usual procedure in a litigation.

Nor is there any good reason why this should not be done by a petition, with the usual forms thereunder, in an equity proceeding, but in a summary way, as distinguished from a plenary suit by bill in equity; in other words, in the form of proceedings by petition in the course of a proceeding in bankruptcy.

By section 6 of the act of 1841, it is provided that the jurisdiction of the district court shall extend "to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." The act of March 3, 1843, (5 St. at Large, 614,) repealing the act of 1841, provides that the repealing act "shall

not affect any case or proceeding in bankruptcy commenced" before its passage, "or any pains, penalties, or forfeitures incurred under the said act, but every such proceeding may be continued to its final consummation in like manner as if this act had not been passed." It cannot properly be said that the proceeding in bankruptcy has been closed, or has reached its final consummation, although the bankrupt has been discharged, and no assets remain to be distributed among creditors, when a deed given under the circumstances in question remains outstanding, illegal, unauthorized, or fraudulent, and when, as a consequence of setting it aside, what was conveyed by it, and seems to be so valuable a possession to the party who holds it, will then remain in the hands of the court, to be disposed of properly by another deed.

Nor can it be doubted that the power to order the deed to be surrendered by the holder, and then to be cancelled, exists equally with the power to set aside the deed. The power as against the holder arises out of the facts of the case, and out of the jurisdiction obtained over his person by the proper service of process on him under the petition, and, if the frame of the petition extends to it, the court, which has authority to vacate the unlawful, collusive, and fraudulent act and deed, has authority, on the same basis, to enforce the delivery up of the deed to the court by the holder.

The jurisdiction in a similar case was exercised by the district court for this district in 1862, under the bankruptcy act of 1841, *In re Conant*. In 1858, the official assignee in bankruptcy of Conant conveyed certain land in Illinois to one Brown, who conveyed it to one Jones. One Taggard had bought the same land in 1843, and obtained a deed of it, and had gone into possession of it, and held it until he died, in 1851. His heirs, having sued Jones in trespass, in Illinois, to establish their title to said land, petitioned the district court, in 1861, for relief against the deed of the assignee. The assignee and Brown and Jones were cited to answer. The court found that it had been induced to order the sale by the assignee under the impression on the part of the court that the land was without value, and that the sale was to be

made only to relieve the land in the hands of Taggard from any cloud or technical infirmity of title; that the court had given the title gratuitously to a party who might use it in fraud of the estate of the bankrupt or of an honest purchaser of it; and that the order of sale ought not to stand, but should be rescinded, as having been obtained by a party cognizant of all the facts impeaching its equity and justice. The above state of facts was recited in an order which the court made July 7, 1862, vacating and declaring void the order of sale made in 1858, and declaring null and void the deed from the assignee to Brown, and ordering the assignee and Brown and Jones to deliver the deed to the clerk of the court to be cancelled.

In *In re Mott*, in the district court for this district, under the bankruptcy act of 1841, the official assignee had, on the order of the court, made in 1860, sold a certain interest of the bankrupt in the real estate of his deceased grandfather, at private sale, to one Delaplaine, for \$800 for the property, and \$200 to the assignee for his costs and expenses in the matter, and had given a deed for the property to Delaplaine. Afterwards a bank, which was a creditor of the bankrupt, but had not proved its debt in the bankruptcy proceedings, applied to the court by petition, setting forth that before the order of sale was procured the assignee had agreed to convey the property to the bank for a nominal consideration, and \$25 as his costs, and that he had received the \$25 from the bank. The petition prayed for an order declaring void the sale and deed to Delaplaine, and directing the deed to be surrendered and cancelled, and \$800 in court, received from Delaplaine, to be returned to him, and directing the assignee to convey his interest in said real estate to the bank for a nominal consideration. Delaplaine and the assignee were served personally with the petition, and resisted the granting of its prayer.

The district court, in 1861, ordered the case and the proceedings to be adjourned into the circuit court on certain stated questions, one of which was whether the bank could

carry on the proceedings against the assignee or Delaplaine without having first proved its debt. The matter was heard before Mr. Justice Nelson in the circuit court, and he made a written decision on November 28, 1863, in which he said that he was satisfied that the order of sale was improvidently granted, and that it should be set aside; and also that the conveyance under it by the assignee to Delaplaine should be delivered up and cancelled, and the money paid by him, and in court, be refunded to him, and that received by the assignee, and not in court, be refunded by the assignee, and that he did not doubt that the district court had full power and jurisdiction to make an order to the above effect. As to the prayer for a conveyance to the bank by the assignee, he said that the district court had no power to order it to be made, and that the asset ought to be sold at public auction. Thereupon the district court, by an order made June 17, 1864, dismissed the petition of the bank, and ordered that the sale by the assignee to Delaplaine be set aside as irregular, inequitable, and void, and that the order for such sale be revoked, as having been obtained by proceedings that were irregular and inequitable. The written decision of the district court, resulting in said order, proceeds, in not ordering a deed to be given to the bank, and in not awarding any further relief to the bank against Delaplaine or the assignee, on the view that the bank showed no subsisting title or interest in itself warranting the granting of such further relief. It had no such interest as that of being in possession of the land, claiming title to it, which makes the distinction between the petitioner in that case and the petitioner in the *Conant Case* and in the present case. But the court, set in motion by the petition of the bank, set aside the deed, although it did not order it to be delivered up.

Nothing is adjourned in the present case into this court but the question of power on the facts stated. The evidence taken is not before this court. It is not intended, therefore, in anything that has been said, to express or intimate any opinion by this court as to what ought or ought not to be

done by the district court in the case, under the existence of the power.

The question adjourned must, in its entirety, be answered in the affirmative.

GRAY, Surviving Assignee, etc., v. BECK and another.

(District Court, D. New Jersey. April 11, 1881.)

1. EQUITABLE RELIEF—JURISDICTION—ASSIGNEES IN BANKRUPTCY.

A bill in equity by assignees in bankruptcy to recover the value of personal property transferred to the defendant by the bankrupt, in fraud of his creditors, will be dismissed for want of jurisdiction; the complainant has a plain, adequate, and complete remedy at law.

2. SAME—SAME—FINAL HEARING.

A bill will be dismissed for lack of equity, although the point is made for the first time when the cause comes before the court for final hearing on the pleadings and proof.

3. COSTS.

But inasmuch as the defendant is in fault for not raising the objection in the pleadings, the bill will be dismissed without costs to the defendant.

In Equity.

Nelson Smith, for complainant.

M. T. Newbold, for defendant Beck.

NIXON, D. J. This suit was originally commenced by William M. Gray and Alexander H. Wallis, assignees in bankruptcy of John Werder, against Joseph B. Beck and Werder, to recover the sum of \$2,000, and also for the value of a barrel of wine, alleged to have been transferred to the said Beck by the bankrupt, after the proceedings in bankruptcy had begun, in fraud of his creditors. Pending the proceedings, Wallis, one of the assignees, died, and the suit has been revived and continued in the name of the surviving assignee. A decree *pro confesso* was taken against the defendant Werder for not appearing and answering, and the other defendant, Beck, filed an answer to the bill of com-

plaint, denying that he received the sum of \$2,000, or any other sum of money, from the bankrupt in fraud of his creditors, or for any other purpose; and, after acknowledging the receipt of a barrel of wine, alleging the same was sent to him by Werder as pay or offset for certain short weights in flour that he had purchased of Werder, and not for any other intent or purpose.

A large amount of testimony was taken by the respective parties, and when the cause came before the court for hearing on the pleadings and proofs, the counsel for the defendant suggested that the bill, answer, and testimony disclosed a clear case for proceedings at law, and that this court, in equity, had no jurisdiction over it. Courts listen with great reluctance to such suggestions on the final hearing, where the defendant has not thought proper to raise the objection by demurrer, or in the answer. They regard the forms of proceeding as handmaids, to be used for obtaining rather than for obstructing the rights of the litigants, and frequently decline to consider questions touching the mere form of the remedy which are not brought to their attention until after expense has been incurred in taking the testimony in the cause. *Underhill v. Van Cortland*, 2 John. Ch. 339.

But, notwithstanding this, the question raised is always treated in the courts of the United States as jurisdictional, and must be entertained, whenever urged, because no consent of parties, however expressed or inferred, can give jurisdiction to the court where the law does not give it. The equitable jurisdiction of these courts is limited. It cannot be invoked or sustained in any case "where a plain, adequate, and complete remedy may be had at law." Such are the express provisions of the statute, (Rev. St. § 723;) and the refusal of the court to give them effect is a denial to the adverse party of his constitutional right of the trial of the issues of fact by a jury. *Hipp v. Baden*, 19 How. 278.

Does the bill disclose a case in which the complainant has not a complete remedy at law? It is filed by assignees in bankruptcy to recover the value of personal property which it

is alleged the bankrupt gave to the defendant to place it for his own use beyond the reach of creditors. It was doubtless a fraudulent act, if committed, but courts of law have a concurrent jurisdiction with courts of equity in many matters of fraud; and, in all cases where concurrent jurisdiction exists, the party seeking relief must come into the courts of law if he has a plain, adequate, and complete remedy for the wrong complained of. After the expense and delay to which the parties have been subjected in the suit, I have endeavored to find some tenable ground upon which I could stand and retain the case for adjudication, but have failed in the effort. The prayer of the bill is that the defendant Beck may be decreed to pay to the complainants the sum of \$2,000, which the bankrupt put into his hands to conceal from his creditors, and the further sum of \$54 for the barrel of wine deposited with him for a like purpose,—a naked legal demand for the payment of money wrongfully appropriated and withheld,—and for the value of personal chattels fraudulently transferred. There are no features or aspects of the case which would seem to authorize or justify an equitable action. The complainants have not even the excuse of seeking a discovery of anything, for they expressly waive an answer under oath.

I am, therefore, constrained to dismiss the bill for want of jurisdiction in equity; but inasmuch as the defendant is in fault for not raising the objection in the pleadings, it is dismissed without costs to the defendant.

NOTE. See *Sill v. Solberg*, *ante*, 463.

PECKHAM *v.* COZZENS.SMITH *v.* SAME.

(Circuit Court, D. Rhode Island. March 2, 1881.)

1. ILLEGAL PREFERENCE—KNOWLEDGE OF CREDITOR.

The illegality of a preference depends upon the actual knowledge of the creditor.—[ED.]

Appeals from district court.

Wm. P. Sheffield, for complainants.

Saml. R. Honey and *Francis B. Peckham, Jr.*, for defendant.

LOWELL, C. J. E. Truman Peckham was made bankrupt in this district upon a petition filed March 22, 1878, and William J. Cozzens is his assignee. On the twenty-second of January, 1878, the bankrupt had given two mortgages of land and buildings to his relatives, William J. Peckham and John G. Smith, to secure them for liabilities which they had incurred for him. The land was duly sold by the assignee, free of encumbrances, and the purchase money is in court to answer in its stead. Bills and cross-bills were filed in the district court, the assignee insisting that the mortgages were fraudulent preferences, and the mortgagees maintaining their validity. The district court found the mortgages to be valid.*

The question is whether Peckham and Smith—for they stand precisely alike—had reason to believe that E. Truman Peckham was insolvent on the twenty-second of January, and knew that he intended to commit a fraud upon the act.

I agree with the district judge that the assignee has failed to prove the necessary facts. The evidence was unfortunately taken upon written interrogatories, and is very vague. There are suspicious circumstances, but I cannot say that it is proved that the mortgagees knew much about the affairs of the bankrupt, or had any particular reason to believe him insolvent.

*See 3 FED. REP. 794.

It is not the case of a conveyance out of the ordinary course of business of the debtor. The mortgage of a homestead has nothing to do out of the course of business. The fact of an attachment having been made was constructively known to all the world by its record, but the illegality of a preference depends upon actual knowledge, and there is no evidence that the fact was actually known to the mortgagees. I have read the evidence carefully, and must repeat that knowledge is not brought home to those parties. As they have absorbed pretty much all the assets, I do not feel bound to give them costs.

Decrees affirmed, without costs.

PAGE and others *v.* CITY OF CHILLICOTHE.*

(*Circuit Court, S. D. Ohio.* April, 1881.)

1. JURISDICTION—ACT OF CONGRESS DIVIDING S. D. OHIO INTO TWO DIVISIONS—WHERE SUIT TO BE BROUGHT—PERSONAL PRIVILEGE—WAIVER.

Section 4 of the act of congress dividing the southern district of Ohio into two divisions, which provides that "all suits not of a local nature, in the circuit and district courts, against a single defendant, inhabitant of said state, must be brought in the division of the district where he resides," does not affect the general jurisdiction of the court, but rather confers a personal privilege upon the defendant, which he may waive.

2. SAME—SAME—SAME—SAME—GENERAL APPEARANCE—WAIVER.

Where a suit was brought in the western division against a resident of the eastern division, who was served with process in the eastern division, and on the return-day of the writ entered its general appearance without exception to the jurisdiction, and at the same and a subsequent term had, upon its motion, the time extended in which to answer, *held*, that the defendant, by such appearance and proceedings, waived the right to object to the jurisdiction of the court.

Motion to Dismiss for Want of Jurisdiction.

*Reported by Messrs. Florien Giauque and J. C. Harper, of the Cincinnati bar.

Banning & Davidson and L. M. Hosea, for motion.

Jephtha D. Garrard, contra.

SWING, D. J. The bill in this case alleges that complainants are owners of a certain patent in relation to improvements in induction-coil apparatus; that the defendant is infringing their said patent, and prays for an injunction and for damages. The bill was filed September 27, 1880, and on the same day a subpoena in chancery was issued to the marshal of said district, who returns that he served the same in Ross county, Ohio, by delivering a copy of it to the mayor and clerk of the city of Chillicothe. The subpoena required the defendant to appear by the first Monday in November. On the first Monday of November the defendant, by its attorneys, Banning & Davidson, entered its appearance in the cause. On the fourth day of December, on motion of defendant, leave was given to answer by the first Monday of February. On the twenty-first day of February, 1881, on motion of defendant, leave was given to answer in 20 days; and on the eighteenth day of March, 1881, the defendant filed its motion to dismiss, as follows: "Now comes the defendant, the City of Chillicothe, by its counsel, and moves the court to dismiss the bill herein filed, for want of jurisdiction, the defendant being a resident of the eastern division of the southern district of Ohio, and not found or served in the western division herein." On the fourth of February, 1880, an act was passed by congress dividing the southern district of Ohio into two divisions, to be known as the eastern and western divisions; Ross county, in which the city of Chillicothe, the defendant, is, being in the eastern division. This act provides that "all suits not of a local nature, in the circuit and district courts, against a single defendant, inhabitant of said state, must be brought in the division of the district where he resides." Under this provision it is clear that this suit should have been brought in the eastern division, and not in this, and if the defendant had entered its appearance for the purpose only of moving to dismiss the suit, the motion would have been granted; but the appearance was the general appearance of the party. Not only

so, but during the term at which the appearance was entered the defendant moved the court for, and obtained, further time in which to answer; and at the next succeeding term, upon its motion, it was granted further time in which to answer; and not until the expiration of this time was an exception to the jurisdiction taken. The subject-matter of the suit is one over which this court has jurisdiction, and if the defendant resided within this district the residence of the parties would be such as to give the court jurisdiction. It is not a case where the parties must be residents of different districts in order to give the court jurisdiction, but both parties in patent suits may be residents of the district within which the suit is brought. Under the acts of congress conferring jurisdiction upon this court, the subject-matter and the citizenship of the parties, whether residing in this or the eastern division, would give this court jurisdiction of this cause if service had been made within this division. The provision in the act for the division of the district, that the suit should be brought in the division of the district in which the defendant resides, is not one creating the jurisdiction of this court, but is one for the personal convenience of the defendant.

This case is clearly distinguishable from the cases referred to by the learned counsel for the defendant, which hold that consent cannot confer jurisdiction, and that objections to the jurisdiction may be taken at any stage of the case. In those cases either the subject-matter or the citizenship, which was essential to give jurisdiction, did not exist; but in this case the only question is as to the place where the jurisdiction shall be exercised.

In *Gracie v. Palmer*, 8 Wheat. 699, the suit was brought in the state of Pennsylvania, and none of the defendants were citizens of that state, and Mr. Webster objected to the jurisdiction because it did not appear that the defendants were inhabitants of, or found in the district in which suit was brought, at the time of the service of the writ, as required by the eleventh section of the judiciary act of 1789. Chief Justice Marshall, in delivering the opinion of the court, stated

"that the uniform construction, under the clause of the act referred to, had been that it was not necessary to aver on the record that the defendant was an inhabitant of the district or found therein; that it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties. The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance; that if process was returned by the marshal as served upon him within the district it was sufficient; and that where the defendant voluntarily appeared in the court below, without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter."

In *Ex parte Schollenberger*, 96 U. S. 369, Chief Justice Waite says: "The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

These authorities show very clearly, I think, that the defendants might waive the right to have this suit brought in the eastern district, and that by entering its general appearance in the cause, and its several applications for further time in which to answer, I hold that it has waived its right, in this case, to except to the jurisdiction of the court; the motion will, therefore, be overruled.

ELECTRIC RAILROAD SIGNAL CO. v. HALL RAILROAD SIGNAL CO.

(Circuit Court, D. Connecticut. April 5, 1881.)

1. INVENTION—PRIORITY.

He who first reduces his invention to a fixed, positive, and practical form would seem to be entitled to a priority of right to a patent therefor.

2. SAME—SAME.

In such case, however, he who invents first has the prior right, if he uses reasonable diligence in adapting and perfecting the same, although the second inventor has, in fact, first perfected the same and reduced the same to practice in a positive form.

3. SAME—SAME—DILIGENCE.

In such case the determination of the fact of diligence is not to be reached by a comparison of the diligence of the two inventors.

4. SAME—SAME—SAME.

A. mentally worked out an invention about November 6, 1872, and, without making any efforts to reduce the invention to practice, applied for a patent May 15, 1873. B. independently reached the same result about December 21, 1872, and reduced the invention to practice in April, 1873. *Held*, where a patent was subsequently granted to A., that B. could not be held liable as an infringer for the use of this invention.—[Ed.]

Charles E. Perkins and Franklin Chamberlin, for plaintiffs.
Simeon E. Baldwin, for defendant.

SHIPMAN, D. J. This is a bill in equity to restrain the defendant from the alleged infringement of letters patent No. 140,536, issued to Frank L. Pope on July 1, 1873, and now owned by the plaintiffs, for improvements in circuits for electric railroad signals. Before the date of this invention electro-magnetism had been utilized for the automatic actuation of signals, denoting both danger and safety upon the line of a railroad. By Johnson's patent of 1858 a single battery was mounted on each train, and was applied to turn the signals in succession. Each signal was operated alternately by two electro magnets; one to turn it to "danger," and the other to turn it to "safety." This plan required a battery for each train. Under Clark's patent of 1861 the signals were operated by the action of a railroad train; but his apparatus made use of a special battery, and an independent electric

circuit for each signal. The system of Thomas S. Hall, which was used on the Harlem Railroad in 1871, moved the signals by stationary batteries, and required two batteries to operate each signal.

The object of the system which Pope patented was to operate automatically a series of signals, in definite and predetermined succession, by the passage of a train, making use of a single battery. The patentee says in his specification: "My invention consists in a peculiar arrangement of electric circuits, in combination with a battery, and with two or more circuit closers, operated by moving trains or otherwise, whereby a series of two or more visual or audible signals, situated at intervals along the line of a railroad, may be operated by currents of electricity derived from a single battery, thereby obviating the inconvenience and expense of employing, as heretofore, one or more separate batteries, situated at or near each signal, for the purpose of actuating the same." The record shows that the invention was a new combination of old devices whereby a novel and useful result was produced, and was patentable. It is assumed that the same invention was placed on the Eastern Railroad of Massachusetts by the defendant, a corporation which has been engaged in the manufacture and erection, upon different roads, of signaling apparatus constructed in accordance with various patents of Thomas S. Hall, and that the change which was made, whereby the earth was used as a part of the circuit, was not a material change or modification of the invention. Letters patent to Hall & Snow, No. 165,570, dated July 13, 1875, describe the defendant's method of electric circuits.

Upon this assumption the main question in the case is that of priority of invention, for it will be manifest that Pope and Hall were each independent inventors of the one-battery system, and that each mentally conceived of the same plan, in substance, in the summer and fall of 1872. Hall is the father of the plan of electric railroad signaling apparatus, which is in use in this country, and in 1872 was actively engaged in studies and experiments, and in the practical

application of the system, which he had then introduced upon the Harlem Railroad. In the same year Messrs. Pope and Hendrickson were actively engaged in attempts to introduce electric signals upon different roads, and in the summer and fall were employed on the line of the Pennsylvania Railroad in Pennsylvania. They were thoroughly in love with the business, were active, energetic, self-reliant, fertile in invention, and were diligent to secure by letters patent the results of their inventive skill. During this time, at the suggestion of one of the officers of the railroad company, Pope had constructed a device by which a primary and secondary signal were operated from the same battery. This device suggested to his mind another idea, and during the week prior to November 6, 1872, he first described to Hendrickson the plan of working a series of signals along the line of a railroad by the use of a single battery. This conversation took place in a jeweler's shop while they were waiting to have some broken wires resoldered, and as they went from the shop to dinner. It was the first definite manifestation or expression of the idea which Pope had in his mind, and establishes the date of the time when he mentally reached the result which was afterwards shown in his application for a patent. He made neither tests nor models nor experiments. His mental result was not reduced, and was not attempted to be reduced, to practice. He intended to test the system before making application, but did nothing of the kind, and after April 25, 1873, he prepared his application, which was filed May 15, 1873. The system was not afterwards placed by Pope upon any road, and there is no evidence that anybody else, professing to act under this patent, has ever reduced it to practice, except that Pope constructed a working model of the whole apparatus in 1875 or 1876, which was set up in his shop in the city of New York.

The patent having been granted to Pope, and now being attacked on the ground that the patentee was not the first inventor, it is not enough for the defendant to show that Hall had conceived the same idea, and had made drawings or models, and experiments with his models, but the defend-

ant must establish that Hall reduced what he conceived to practice in the form of an operative machine, and embodied it in some practical and useful form before Pope made his application, it being a fact in the case that Pope had not reduced his idea to practice before his application. *Ellithorpe v. Robertson*, 2 Fisher, 85; *Union Sugar Refinery v. Matthiesson*, 3 Cliff. 639. The law on the subject of the priority of right between two independent inventors is substantially as it was laid down by Judge Story in *Read v. Cutler*, 1 Story, 590: "In a race between two independent inventors, he who first reduces his invention to a fixed, positive, and practical form would seem to be entitled to a priority of right to a patent therefor. The clause of the fifteenth section of the act of 1836, now under consideration, seems to qualify that right, by providing that in such cases he who invents first shall have the prior right, if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has, in fact, first perfected the same and reduced the same to practice in a positive form." *White v. Allen*, 2 Fisher 440; *Reeves v. Keystone Bridge Co.* 5 Fisher, 456; *Agawam Co. v. Jordan*, 7 Wall. 583.

Hall, during the summer of 1872, was thinking over the same idea which Pope had, and about December 21, 1872, came to the mental result that a one-battery system was feasible. He forthwith wrote to his son, who was in Boston, to join him in Meriden. The son complied with the request, and, with the assistance of other employes, made a working model in accordance with his father's instructions in the upper room of the defendant's shop. Hall, as the manager of the defendant corporation, was constructing at this time, for the Eastern Railroad Company, his system of signals upon the manifold-battery plan. Early in January, 1873, he described the new plan to the manager of the company, who agreed that it might be placed upon his road in lieu of the old plan, at the defendant's expense, if not subsequently approved. About January 20, 1873, Hall telegraphed to George H. Snow, his assistant, to stop work on the railroad and come to Meriden, where he was employed upon the signals

and instruments which the new plan required till the fall of 1873. In the latter part of April, 1873, a new track circuit closer was placed on the down track of the Hartford & New Haven Railroad at Meriden, and a line of telegraph poles was extended to the shop about an eighth of a mile away. Upon these poles wires were put which connected with the track and the battery in the shop. The signals were properly arranged, and were operated by all the down trains on the road. The mechanism remained in position for months. The arrangement described in Pope's patent and this Meriden arrangement were substantially the same.

Subsequently, in December, 1873, after the new track circuit closers were finished, Snow went to the Eastern Railroad to put the new system in operation. Here a practical difficulty was experienced, which is thus explained by Alvah W. Hall, the son of T. S. Hall: "The first difficulty we found was that the magnets, being wound with coarse wire, and thus adapted for the short circuits and comparatively weak batteries with which they had previously been used, required too much battery power to work them on a long circuit. Therefore, when a battery was applied strong enough to work the most distant signal, which signal would have the longest circuit of any of them, it made the current too intense when the signal nearest the battery, which would be on the shortest circuit, was operated to work satisfactorily. The spark, on breaking contact with the circuit closer of this short circuit, following in a burning flame between the points of the circuit closer after the said points were removed from each other their proper distance, destroyed the points and burned them up." A change was made on February 14, 1874, which obviated the difficulty, and which mainly consisted in bringing the ground into use to form part of the circuits. This is the change which the plaintiffs insist was simply mechanical in its character, and which the defendant claims made its combination a new invention. Subsequently, the system of Mr. Hall was introduced upon other railroads, and a large amount of money was paid to his company therefor.

I am clearly of opinion that the application of the one-bat-

tery plan to use on the Hartford & New Haven Railroad in April, 1873, was the reduction to practice in the form of operative mechanism, as distinguished from models, and was the embodiment of the idea in a practical and useful form, as distinguished from experiments, which the law requires. The mechanism to be used was of a peculiar character. It must be used upon and by the aid of a railroad, moving trains of cars as a part of the machinery. It is not to be expected that the inventor could induce the owners of a railroad to expend money on an extensive scale in a new enterprise, neither could he be reasonably expected to place expensive structures upon miles of railroad track. It can only be reasonably required that the entire system should be subjected to practical, daily, and continuous use upon a railroad by whatever trains pass upon the track. Hall reduced the invention to practice prior to Pope's application, and while, so far as Pope was concerned, the new plan rested in theory.

The plaintiffs rely upon the qualification of the rule that he is the first inventor who has first actually perfected the invention; the qualification being that if the one first to conceive of the invention was at the time using reasonable diligence in adapting and perfecting the same, he is recognized as the first inventor, although the second to conceive may have been the first to reduce to practice. It is also true that the determination of the fact of diligence is not to be reached by comparison of the diligence of the two inventors. If Pope was reasonably diligent in perfecting his idea, it does not matter that Hall was exceedingly diligent and made more rapid advances.

The plaintiffs' position is that Pope had mentally worked out his invention by the first week of November, 1872; that Hall had reached the same result in the latter part of December, 1872; that Pope applied for his patent on May 15, 1873, and that there was no laches in this respect. All this is true; and if, meanwhile, he had been engaged in efforts to perfect his invention, his right to the patent could not be assailed on the ground that another was the first inventor.

It was an important step in this invention to originate the

idea of the one-battery system. It was more important and more difficult to overcome the practical hindrances which lay in the way of a successful application of the idea. An examination of the testimony will show that Pope did nothing to perfect what he had accomplished until he had applied for his patent. He explained his plan to Hendrickson about November 6th, who, thereupon, drew a very rude and scanty pencil sketch, which Pope said represented his idea. On December 3, 1872, Hendrickson showed Pope a rough drawing of an improved signal machine which he, Hendrickson, had devised, and which he thought would be well adapted to be used in connection with the one-battery plan. Pope was favorably impressed with the sketch, and told Hendrickson to prepare a working model at once, and he, Pope, would prepare an application for a patent for the machine. The model was tested and found to work well, and Pope says: "I immediately proceeded to prepare an application for a patent, which was filed in the patent-office on the twenty-sixth of December, 1872. * * * As this signal was equally well adapted to be used in connection with the system of circuits which we already had in operation on the Pennsylvania Railroad and on the Lehigh Valley Railroad at Bethlehem, I described in the specification the signal as working in a system of this description, making no allusion to the proposed plan of working a number of them from a single battery, as the particular arrangements of circuits had no necessary connection with the features of the invention, which were considered to be new, and which were intended to be covered by the claims. I intended to take out a separate patent on this system of circuits after I had had an opportunity to test it, and therefore did not wish to make any disclosure of it in the specification of the patent of another invention. During the latter part of November and the early part of December, 1872, I was also engaged in the preparation of an application for letters patent intended to embody the improvements which I had made in the machinery and system which we had placed on the Pennsylvania Railroad; that is to say, the independent locking magnet, the cut-off for transferring the battery cir-

v.6,no.6—39

cuit from the main magnet to the locking magnet and secondary signal, the arrangement of the primary and secondary signals with reference to each other, and some other minor points. This application was completed about the twentieth of December, and immediately upon its completion I took it to Washington myself and filed it on the twenty-first of December, 1872."

On or about February 10, 1873, Pope had a conversation with Mr. A. G. Davis, superintendent of telegraphs on the Baltimore & Ohio Railroad, in regard to the introduction of a signal system on that road, and told Davis that he had devised a plan by which the requisite number of signals on eight or ten miles of road could be worked from one battery, and that he was willing to undertake to do this at any time. In March a single signal was put up on the road, but it is evident that this signal was not put up as a sample of the one-battery system. Sometime between February 10th and April 1st, Pope had one or more conversations with Edwin D. McCracken in regard to the system; but, giving to these interviews the weight which they have in Pope's mind, the conversations were simply an assertion of what he could do by this proposed plan. The only thing thereafter done was to make out the application. Mr. Pope says: "As the various parts of the combination, circuit closers, signals, signal machinery, etc., had already been thoroughly tested in practice, and almost continually, for over a year, it did not seem to me necessary to test the new combination in actual service before making an application for a patent, as it was a very easy matter for any competent electrician to calculate from existing *data* the amount of battery power, the size of conductors, and the proportionate electrical resistance of the different parts, so as to insure the satisfactory operation of the system in practice. After completing and filing an application for a patent on an improved track connection which had been invented by Mr. Hendrickson, and which was sent to Washington and filed on the twenty-fifth day of April, 1873, I prepared the application for the patent, which was issued July 1, 1873, as No. 140,536, and is Exhibit A. This

application was filed as soon as the model was completed, and reached the patent-office on the fifteenth of May, 1873."

During the period between November 6th and May 15th, Pope was busy, but he was not busy about this invention. He was occupied with other inventions, but he was doing nothing with this one. The just and equitable principle of the law, which gives a patent to the inventor who first conceives of the invention, provided he is diligently engaged in perfecting it and adapting it to use, and overcoming the practical difficulties which are always to be surmounted before theory becomes fact, although he was slower in the race than the one who was second to conceive, does not apply to Pope. Who faintly conceived the idea is not known. Pope first attained a mental result. After that, he was actively occupied in the same branch of study, but he did not develop this system in wood and metal. Hall did develop it, made it useful and practicable, and achieved success. In my opinion it would be a great wrong to decide that the defendant is liable as an infringer.

Let the bill be dismissed.

WILSON v. COON and others.

(*Circuit Court, S. D. New York.* December 23, 1880.)

1. "SPECIFICATION."

The word "specification," as employed in the patent laws, when used without the word "claim," means description and claim.

2. SAME—RE-ISSUE.

Hence, under section 4916 of the Revised Statutes, a re-issue is allowed when the specification is defective or insufficient, in regard to either the description or the claim, or to both, to such an extent as to render the patent inoperative or invalid, if the error arose in the manner mentioned in the statute.

3. SAME—SAME.

If a patentee, in the description and claim in his original patent, erroneously set forth something short of his real invention, it is a proper case for a re-issue, although his real invention may be fully shown in the drawings and model.

4. RE-ISSUE ON VALID PATENT.

A re-issue is not invalid merely because the claim of the original patent was valid, and suit could be sustained thereon.

5. NOVELTY—SIMILARITY IN SHAPE.

Similarity in shape does not establish anticipation, if the two inventions are different as mechanical structures.

In Equity.

Marsh & Wallis, for plaintiff.

S. F. Kneeland, for defendants.

BLATCHFORD, C. J. This suit is founded on re-issued letters patent No. 8,169, granted to the plaintiff, as inventor, April 9, 1878, for an "improvement in collars," the original patent, No. 197,807, having been granted to him December 4, 1877. The drawings of the original and the re-issue are the same. The specification of the re-issue, reading what is within and what is outside of brackets and not what is *underscored*, is as follows: "In the accompanying drawings, figure 1 represents a side elevation of my improved collar, and figure 2 a perspective view of the same. Similar letters of reference indicate corresponding parts. This invention refers to an improved standing collar, that retains all the advantages of the old style curved band, without the objection of springing the collar too far from the neck, so as to come in contact with the coat and soil the collar. The collar also hugs the neck band in such a manner that the collar is prevented from overriding it, resulting in a more comfortable fit. The invention consists of a standing [or other] collar having *sectional* [curved and graduated] bands [that extend along the lower edge of the] *starting from center of collar*, or [from] any other point between center and ends, *and continuing with a graduated curve* to and beyond the ends of the collar. Referring to the drawings, A represents a standing [or other] collar of my improved construction, and B the [curved and graduated] *short or sectional* bands, which [extend] *start* from the center of [the] collar, or any other point between the center and ends, and continue along the lower part of the [top or body of the collar] *same* with a graduated curve and increasing width, to and beyond the ends of the collar, [the ends being

curved,] in the same manner as ordinary bands. The bands, B, are made either to overlap the collar proper, or the collar is made to overlap the bands, or one part of the bands laps over the collar ends, while the remaining part is overlapped by the collar, so as to obtain smoothly-covered joints at both meeting ends of collar and [graduated] *sectional* bands. The bead [or binding] formed by the connection of collar and band may also be continued, if desired, along the lower edge of that part of the collar [body] between the bands [so as to connect the graduated bands] and [impart] thereby a more ornamental appearance *imparted* to the [collar] *same*. [The rear button-hole, *a*, is arranged in the top or body of the collar above the bead or binding at the lower edge of the same, which position of the button-hole, in connection with the graduated bands, produces] *The use of the short or sectional bands produces a saving of material, as compared to the old style of continuous band, and furnishes a collar that hugs the neck band in superior manner, without springing back so as to come in contact with the [coat] collar. [The shorter graduated bands produce also a considerable saving of material as compared to the old style of continuous band that extends at uniform width along the lower part of the collar.]*" Reading in the foregoing what is outside of brackets, including what is *underscored*, and omitting what is within brackets, makes the specification of the original patent.

There are four claims in the re-issue, as follows: "*First*, a collar provided with a band composed of the parts B, B, curved, and tapered or decreasingly graduated from the ends towards the middle, as shown and described; *second*, a collar having short or sectional bands starting from the center of the collar, or any point between the center and ends thereof, and continuing with a graduated curve to and beyond the ends of the same, substantially as and for the purpose set forth; *third*, the combination with a collar having short bands, graduated on a curve and decreasingly towards the middle, of a band-connecting bead or binding along the lower edge, as set forth; *fourth*, a collar having curved

and graduated bands that extend along the top or body of the collar from the center, or any other point between the center and ends thereof, to and beyond the ends of the collar, and having the rear button-hole placed above the band or binding into the top or body of the collar, substantially as shown and described."

The claim of the original patent was as follows: "A collar, A, having sectional bands, B, starting from the center of the collar, or any point between the center and ends thereof, and continuing with a graduated curve to and beyond the ends of the same, substantially as described and shown, and for the purpose set forth."

It is contended for the defendants that the re-issued patent is void because the original patent was valid and operative, and because it contains new matter, and entirely changes the character of invention set forth in the original patent, and because the re-issued patent was intended to cover a different collar from that originally invented. This re-issue was granted under section 4916 of the Revised Statutes, which provides as follows: "Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming, as his own invention or discovery, more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent, and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued. * * * The specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so re-issued, together with the corrected specification, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor, in case of a machine patent, shall the model or drawings be amended, except each by the other; but, when

there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid." This enactment is the same as section 53 of act of July 8, 1870, (16 St. at Large, 205.) The word "specification," when used separately from the word "claim," in section 4916, means the entire paper referred to in section 4888, namely, the written description of the invention, "and of the manner and process of making, constructing, compounding, and using it," and the claims made. The word "specification," meaning description and claims, is used in that sense in sections 4884, 4895, 4902, 4903, 4917, 4920, and 4922. In some cases, as in sections 4888 and 4916, the words "specification and claim" are used, and in section 4902 the word "description" and the word "specification" are used. But it is clear that the word "specification," when used without the word "claim," means description and claim.

Therefore a re-issue is allowed, under section 4916, when the specification is defective or insufficient in regard to either the description or the claim, or to both, to such an extent as to render the patent inoperative or invalid, if the error arose in the manner mentioned in the statute. In such case there may be a corrected specification—that is, one corrected in respect to description or claim, or both,—and there may be a new patent in accordance therewith, but the new patent must be for the same invention. This does not mean that the claim in the re-issue must be the same as the claim in the original. A patentee may, in the description and claim in his original patent, erroneously set forth, as his idea of his invention, something far short of his real invention, yet his real invention may be fully described and shown in the drawings and model. Such a case is a proper one for a re-issue. A patent may be inoperative from a defective or insufficient description, because it fails to claim as much as was really invented, and yet the claim may be a valid claim, sustainable in law, and there may be a description valid and

sufficient to support such claim. In one sense such patent is operative and is not inoperative. Yet it is inoperative to extend to or claim the real invention, and the description may be defective or insufficient to support a claim to the real invention, although the drawings and model show the things in respect to which the defect or insufficiency of description exists, and show enough to warrant a new claim to the real invention. It can never be held, as it never has been held, in a case where the point arose for decision, that a patent cannot be re-issued where a suit could be sustained on the specification and claim as they are.

The word "specification" was used in section 13 of the patent act of July 4, 1836, (5 St. at Large, 122,) in a different sense from that in which it is used in section 53 of the act of July 8, 1870, (16 St. at Large, 205,) and in section 4916 of the Revised Statutes, taken from section 53. The provision of section 13 of the act of 1836 was that a patent might be re-issued when it was "inoperative or invalid by reason of a defective or insufficient description or specification," and the new patent was to be issued with a corrected "description and specification." This language was based on that of section 6 of the act of 1836, which required the inventor to give in writing a description of his invention, and of the manner of making and using it, and also to "particularly specify and point out" what he claimed as his invention. Under this language the "specification" was the claim, and the rest was the description. This distinction was kept up in section 13 of the act of 1836. But in section 26 of the act of 1870 the word "specify" is omitted, and the words "specification and claim" are used, applying the word "specification," in that connection, to the description alone. This state of things continues in section 4888 of the Revised Statutes. Then, as before pointed out, the word "description" is omitted in section 53 of the act of 1870 and in section 4916 of the Revised Statutes, and the word "specification" alone is preserved, meaning, when used without the word "claim," the description and the claim. But the meaning of section 13 of the act of 1836, and of section 53 of the act of

1870, and of section 4916 of the Revised Statutes, is the same, and the cases for a re-issue are the same under all these enactments.

The view urged for the defendants is that the original patent was intended to secure the invention of a collar having, as its only peculiarity, two separate short or sectional bands, each commencing at the center, or at any point between the center and the end, and extending to and beyond the end of the collar; that the original specification and drawings show applied to the body of the collar two short bands, each covering a section, as distinguished from one long continuous band along the entire lower portion of the collar; that such invention was fully covered by the claim of the original patent, and was correctly described and represented in the specification and drawings of the original patent; that the original specification and claim contained all that the invention really was; that the re-issue covers a new invention; that in the re-issue the invention is made to be one of a collar having curved and graduated bands, and having the rear button-hole thrown into the top or body of the collar, above the band; and that the re-issue is so framed as to cover a long continuous band, narrowed in the center.

A reference to cases decided by the supreme court in regard to re-issued patents will show that the views before set forth on the subject of re-issues are consistent with those decisions. In *Batten v. Taggart*, 17 How. 74, a patentee invented an apparatus for breaking coal, and combined it with an apparatus for screening coal, which he did not invent, and took a patent for the combination only. Afterwards he took a patent for the said breaking apparatus. Afterwards he surrendered both patents and took a re-issue of the first one for the breaking apparatus alone. It was held that, although he had in the first patent described the breaking apparatus without claiming it by itself, and although he had surrendered the second patent, the re-issue was valid. The re-issue described essentially the same machine as the first patent, but claimed, as the thing invented, the breaking apparatus only. The court say: "And this the patentee had a right to do. He had

a right to restrict or enlarge his claim so as to give it validity, and to effectuate his invention." In that case the description in the specification of the first patent was sufficient for the claim of that patent, and that claim was sustainable in a suit on that patent; yet that claim did not effectuate the real invention, which was the breaking apparatus alone, out of combination with the screen; and the case was held to be one proper for a re-issue.

In *Burr v. Duryee*, 1 Wall. 531, it was held that the Boyden machine did not infringe the Wells re-issue, and that if it did the re-issue was void. The claim of the re-issue claimed "the mode of operation, substantially as herein described, of forming bats of fur fibers of the required varying thickness, from brim to tip, which mode of operation results from the combination of the rotating picking mechanism, or the equivalent thereof, the previous former and its exhausting mechanism, or the equivalent thereof, and the means for directing the fur-bearing current, or the equivalent thereof, as set forth." The court held that the invention of Wells was an improvement in a machine having certain peculiar devices, and that the Boyden machine had none of those peculiar devices, nor any substantial identity with them; and that the original patent claimed the whole of Wells' invention—no more, no less.

In *Seymour v. Osborne*, 11 Wall. 516, 544, it is said that the commissioner of patents may, on a re-issue, "allow the patentee to redescribe his invention and to include in the description and claims of the patent not only what was well described before, but whatever else was suggested or substantially indicated in the specification or drawings which properly belonged to the invention as actually made and perfected. Interpolations of new features, ingredients, or devices which were neither described, suggested, nor indicated in the original patent or patent-office model are not allowed, as it is clear that the commissioner has no jurisdiction to grant a re-issue unless it be for the same invention as that embodied in the original letters patent. * * * Corrections may be made in the description, specification, or claim, where the patentee

has claimed as new more than he had a right to claim, or where the description, specification, or claim is defective or insufficient; but he cannot, under such an application, make material additions to the invention which were not described, suggested, nor substantially indicated in the original specifications, drawings, or patent-office model." These remarks were made in regard to section 13 of the act of 1836, and they recognize that an insufficient description, or an insufficient claim, or both, may be amended in particulars substantially indicated in the original specification or drawings or model. They give no countenance to the view that this cannot be done if the claim of the original patent is a good one, on a description sufficient to sustain it.

The case of *Gill v. Wells*, 22 Wall. 1, arose under the act of 1836, on a re-issue, in 1868, of the same patent that was involved in *Burr v. Duryee*. In that case the specification of the re-issue differed from that of the original in leaving out the whole description of the chamber or tunnel, and its appendages, and substituting a full description of other devices different from the chamber, in form at least, to perform the functions of the chamber and its appendages, as described in the original. Material matters were left out of the specification of the re-issue, when compared with the original, and new features were introduced in the description of the devices to be employed in guiding the fibers of the fur when taken from the feeding mechanism by the rotating brush or picker, such devices being different in form, and with different names from those described in the original specification as the means to accomplish the same end. It was held that this made the re-issue invalid. Much is said in the opinion in *Gill v. Wells* that was unnecessary to the decision in that case, and what was so said seems to have been disregarded by the same court in the subsequent case of *The Corn Planter Patent*, 23 Wall. 181, which there sustained re-issued patents on the sole ground that the re-issues were for things contained within the machines and apparatus described in the original patents, against the dissenting opinion of the judge who delivered the opinion of the court in *Gill v. Wells*, and who sought to apply

to the corn-planter case the views he had set forth in *Gill v. Wells*. These cases are commented on in *Herring v. Nelson*, 14 Blatchf. 293, and in *Christman v. Rumsey*, 17 Blatchf. 148.

In *Russell v. Dodge*, 93 U. S. 460, the original specification, as appears from *Klein v. Russell*, 19 Wall. 433, made it essential that the fat liquor should be heated to or near the boiling point, and then compounded with the other substances named, and then applied to the skins. The description to that effect was clear. The claim claimed "the process substantially as herein described of treating bark-tanned lamb or sheep-skin by means of a compound composed and applied essentially as specified." The specification of the re-issue stated that it was desirable to heat the fat liquor to or near the boiling point, and that it was preferred to use the same in connection with other ingredients, which other ingredients were named. The mode of application was set forth, and was to be by applying either the fat liquor or the compound to the skin. The claims of the re-issue were these: "(1) The employment of fat liquor in the treatment of leather, substantially as specified. (2) The process, substantially as herein described, of treating bark-tanned lamb or sheep-skin by means of a compound composed and applied essentially as specified." In *Russell v. Dodge* the court held that the re-issue was (1) for the use of fat liquor in any condition, hot or cold, in the treatment of leather, and (2) for a process of treating the skin by means of a compound in which fat liquor is the principal ingredient; that thus the re-issue covered the use of the fat liquor, hot or cold, and when used alone or in a compound with other ingredients; that the re-issue omitted important particulars, so as to enlarge the scope of the invention; and that the change made, by eliminating the necessity of using the fat liquor in a heated condition, and by making its use in that condition a mere matter of convenience, enlarged the character and scope of the invention, and made the re-issue a patent for a different invention. This decision may well be a precedent for a case like it in its facts. But in every case a re-issue must be adjudged

of by its own facts. General observations by a judge or a court, in deciding a case, must always be read in view of the facts of the case that was *sub judice*, and are not necessarily authoritative, *ex vi termini*, in another case where the facts are not the same, although entitled to consideration, as are the views of a text-writer of experience and repute. This case of *Russell v. Dodge* is often cited, as it has been in the present case, as authority for the proposition that where the claim of a patent is valid, and the descriptive part of the specification is sufficient to support it, the patent cannot be re-issued. The re-issue in that case was invalid for other reasons assigned, and the case does not lay down the above proposition, nor does any case yet decided by the supreme court announce such a proposition to be the law. It will be a sad day for inventors and patentees when the highest tribunal does make an authoritative decision to that effect in those terms. Large numbers of patents have been re-issued and sustained in suits, and vast sums of money have been invested and expended in reliance on the re-issues, where they were worthless if the fact that the claims of the original patents were valid and sustainable, on the descriptions and drawings appended to them, rendered the re-issues invalid.

In *Powder Co. v. Powder Works*, 98 U. S. 126, the original patent was for different processes and appliances for exploding nitro-glycerine, while the re-issues were for compositions of matter. The supreme court held that the processes described in the original had no connection with the compounds patented in the re-issues; that they were not processes for making those compounds; that, in describing the processes, the compounds were not mentioned; and that the invention of the one did not involve the invention of the other.

In *Ball v. Langles*, 18 O. G. 1405, recently decided by the supreme court, the original specifications and drawings showed an oven so constructed that the products of combustion did not and could not pass directly into it. In the re-issue the oven was made a part of the passage-way for the products of combustion, and it was held bad.

In the present case the original specification describes the

advantages of the new collar in the same terms that are used in the re-issue. The bands are described in both as extending from the center of the collar, or from some point between the center and the ends, each way to and beyond the ends. In the original the bands are called "sectional bands" and "short or sectional bands." In the re-issue they are called "curved and graduated bands," and "graduated bands," and "shorter graduated bands." But in the original the bands are described as continuing, after they start, "with a graduated curve to and beyond the ends of the collar," and "with a graduated curve and increasing width to and beyond the ends of the collar." The drawings in the original and the re-issue are identical. The drawings show the rear button-hole as thrown into the top or body of the collar above the band, but the specification of the original omitted any description of such location of the button-hole. The original specification states that "the use of the short or sectional bands produces a saving of material as compared to the old style of continuous band." The description in the re-issue states that "the shorter graduated bands produce also a considerable saving of material as compared to the old style of continuous band that extends at uniform width along the lower part of the collar." This was a proper correction, as it is evident that the expression "continuous band" in the original, in that connection, meant a continuous band of uniform width, because the original provided for a continuous band of decreasing width from the ends towards the middle, each way. The band would be continuous, if the two sectional bands started from the center, but would not be of uniform width, because the parts proceed with a graduated curve and increasing width. A division at the center into two sectional bands would not make the whole band any less a continuous band with a graduated curve and increasing width towards each end, nor would the use of a continuous band of the latter description make the parts of it each side of the center any the less sectional bands. Neither would be a continuous band of uniform width, and, as compared with that, there would be a saving of material by the use of either ar-

rangement. It is manifest that it makes not a particle of difference in the Wilson invention whether there is a vertical seam in the center of the band or not, provided the other features of the collar exist, and that, if there existed before his invention a collar having those features, the fact that it had not such vertical seam would not distinguish it from the Wilson invention. The real invention shown in the original specification is that claimed in the re-issue. The re-issue is valid, and is infringed by the defendants in the collars F, G, H, and I, which have all the features of the Wilson collar, and have no vertical seam at the center of the band.

The principal defence is on the question of novelty. The Wilson patent is not for a design or for a shape. Shape is not involved, except so far as a particular shape may result from the mechanical construction patented. To show a prior collar having the same shape, in outline, as a whole, will not defeat the patent, any more than a collar having the same shape, in outline, as a whole, will necessarily infringe, though not having the same mechanical construction. The general shape, in outline, of the one collar, consisting of body and band, as a whole, may be the same as that of another collar, yet there may be such differences in the shapes of the bodies and the bands of the two, relatively to each other, and such differences otherwise, as to make the two different as mechanical structures.

Exhibit No. 3 and Exhibit No. 16 are short-band collars. But they are not the Wilson collar. They do not embody its features. Photograph G G, where the upper collar is No. 16, and the lower one No. 3, and the middle one the Wilson collar, shows this. A comparison of photograph H H, of the Wilson collar, with photograph I I of No. 16, shows the difference between those two; and a comparison of the former with photograph J J, of No. 3, shows the difference between those two. Photographs K K and L L, in which the upper collar is No. 3 and the lower collar is the Wilson collar, show the different position and action of the two on the neck and on the shirt to which they are buttoned, resulting from their mechanical construction. The evidence shows

that neither No. 3 nor No. 16 has the same action on the neck-band of a low-cut shirt that the Wilson collar has.

The defendants claim to have shown that collars with a graduated band, being a continuous band, narrow in the center, and having the back button-hole in the body of the collar, and in substance like the defendants' collars, F, G, H, and I, existed before Wilson's invention. Mr. Coon, one of the defendants, testifies that in December, 1876, or January, 1877, which was before Wilson's invention, he saw at J. S. Lowery & Co.'s, in the city of New York, a collar like the defendants' collar, H, with the button-hole in the body of the collar, above the band. Neither the collar he so saw, nor any collar that was at Lowery & Co.'s at that date, is produced. He is asked whether the band was narrowest in the center, and he replies, "I should think it was." On cross-examination, he states that he had known Lowery & Co. for 15 years or more, and been in the habit of selling to them; that he saw there only a few samples of the collar referred to; that he bought none and took none away; that that was the first time he had seen any of such collars; and that he was not impressed with them at all, and did not pay much attention to them, and did not think it worth while to make any like them. The success of the Wilson collar, and the fact that the defendants made none of their infringing collars till after they had seen the Wilson collar, and the fact that the Wilson collar supplied a want in the mechanical construction of a collar which had been felt, and that many arrangements, more or less successful, had been devised to try and attain the result attained by the Wilson collar, go very far to show that no collar known to the trade prior to the Wilson collar could have been substantially the Wilson collar, or it would at once have been taken up and have met with the same success which attended the Wilson collar. On this view, and on the evidence of Mr. Coon, taken as a whole, about this Lowery collar, it cannot be held to have been shown satisfactorily that the defendants' collars existed in that collar before Wilson's invention.

Mr. Merwin testifies that he sold some finished four-in-

hand collars, with wide bands, to a customer named Beach, in 1876; that, at the request of Beach, the central part of the band behind was then cut out with scissors, and a slit for a button-hole was cut above in the body of the collar, in one or more of those collars; that the collar was not then stitched up in Merwin's store, nor the new button-hole worked; that he never made any of such collars of the new cut to sell; that he never had any in his store for sale during 1876 and 1877; and that he does not know of any collars ever being on the market for sale, made by cutting out such part of the band on the four-in-hand-collars. No original collar so cut out at the time is produced. Mr. Merwin now takes a four-in-hand collar and marks on it with a lead-pencil and says the change was "about like that," and that "it was cut out by that line about, as nearly as I can judge." Mr. Merwin says, also, that he either marked out such a collar, or cut out a pattern to make some by, and sent it to Mr. Crissey. Mr. Crissey states that Mr. Merwin, in the summer of 1876, cut out, in his presence, a four-in-hand collar, cutting the button-hole in the body above the band; that he, Crissey, had two dozen of such collars made at his factory in Troy; and that he sold some of them, "if my memory serves me," and used part of them for samples. He does not describe the collar. He is made, by leading questions, to testify thus: "15 Q. Was the shape of the collar, so cut out, similar in principal and design to defendant's Exhibit No. 4? (Exhibit No. 4 being shown.) A. I should say that it was. 16 Q. It was narrowed in a graduated curve towards the center, in that form, was it? A. Yes, sir. 34 Q. And in the collar you manufactured, as testified to by you, they were narrowed down towards the center? Were they narrowed down, or not, towards the center, in the body of the collar? A. Yes, sir; as nearly as I remember now." He says that he sent the two dozen, when made, to Merwin & Co. But Merwin testifies to nothing of that kind. On the contrary, he says that he never had any in his store for sale in 1876 and 1877. Mr. Crissey afterwards produces a drawing made

v.6,no.6—40

in September, 1875, of the collar to which he says he refers. But no original collar is produced. It does not appear that any were sold in the finished state, or how they answered the purpose aimed at. Exhibit No. 4 and Exhibit No. 19 are produced as showing the collar referred to. The forewoman of Crissey's factory in 1875, having charge of the sewing, and turning and binding of the collars, and making button-holes in them, says that she saw no collar there like either Exhibit, in 1875 or 1876 or 1877. The woman who says she cut all the button-holes in special-order collars, made in Crissey's factory in 1875 and 1876, says she never saw such collars as Exhibit No. 4 and Exhibit No. 19 there, and never cut button-holes there placed like the button-holes in those Exhibits. In view of the foregoing testimony, and of the evidence that this cut-down four-in-hand collar, whatever it was, attracted no attention in the trade so as to make any demand for it, and of the great demand that at once arose for the Wilson collar when it became known, it must be held that it is not established that the Wilson collar is anticipated by anything done by Merwin or by Crissey, or that the defendants' collars are shown to have existed in any collar got up by Merwin or by Crissey. I see no sufficient evidence that a collar like No. 18 anticipates the Wilson collar.

As to Exhibit No. 17, the Herald collar cut down by Townsend, the evidence is not satisfactory that this identical collar No. 17 was not cut down after Wilson made his invention. No collar cut down by Townsend except No. 17 is produced. As to the others which Townsend cut down all rests in memory. The exact shape and fit and operation of them cannot be told. He merely says he cut them out in the back to lower them, or had them cut out. He evidently regarded them as experimental, for he says he did not wear them long, and got collars of another style. They suggested to no one the idea of making any like them for sale. The case is not like that of *Coffin v. Ogden*, 18 Wall. 120, where Erbe regarded his lock as a perfected and complete invention. It is controlled by the principles which governed in *Gaylor v. Wilder*, 10 How.

477; *Hall v. Bird*, 6 Blatchf. 438; *Cahoon v. Ring*, 1 Cliff. 592, 611, 612; and *Hartshorn v. Tripp*, 7 Blatchf. 120.

The same observations dispose of the cutting out of the four-in-hand collars which Parker caused to be done.

The duplex-curve collar, of which the Umpire, Exhibit No. 9, may be taken as a specimen, does not anticipate the Wilson invention. As before remarked, it is not the design or outline of the whole collar, composed of body and band, that is patented by Wilson. The duplex-curve collar has no such arrangement of band as the Wilson collar has. It has a band of substantially uniform width, though not a straight band, the lower line of the band being a duplex curve, and the upper line corresponding with the lower line, as far as the upper line extends. This is, doubtless, the "old-style curved band," mentioned in the Wilson specifications. There is novelty and utility in the Wilson collar, resulting from the bands in it, beyond what is found in the duplex-curve collar; and, besides that, the duplex-curve collar did not have the button-hole in the body of the collar.

Defendants' Exhibits Nos. 22, 23, and 24, and the English Lawrence patent, do not anticipate the Wilson invention, as clearly appears from the testimony, in connection with plaintiff's Exhibits N N, O O, P P, Q Q, and R R.

The plaintiff is entitled to maintain this suit in his own name. It is not shown that any one else has any title in the patent. There must be a decree in favor of the plaintiff for a perpetual injunction, and an account of profits and damages, with costs.

THE SCHOONER MAY & EVA.

(District Court, D. New Jersey. April 8, 1881.)

1 JETTISON—AVERAGE CONTRIBUTION—DECK LOAD.

If a deck load is jettisoned for the common benefit, the owners are entitled to a general average contribution for the loss sustained, although the shipper and master both agreed that the cargo should be carried on deck.

In Admiralty. Libel *in rem*.

H. G. Ward, for libellants.

Henry R. Edmunds, for respondents.

NIXON, D. J. The libellants in this case were the owners of a cargo of iron pipes, shipped on board of the schooner *May & Eva*, at Millville, New Jersey, on the fourteenth day of October, 1879, for which the master signed two bills of lading in precisely similar terms or import; one for 31 tons, to be delivered in the city of New York, and the other for 68 tons, to be delivered at the United States military academy at West Point, in the state of New York. These bills of lading, signed by the master, state that the said cargo was to be carried *in* and *upon* the said schooner. In the course of the voyage the vessel encountered very tempestuous weather, which endangered the safety of herself and cargo, and the master threw overboard from the deck load 28 of the iron pipes, valued at \$228.37.

The libel is filed by the owners of the cargo thus jettisoned against the vessel, her freight, and remaining cargo, for a general average contribution for the loss thus sustained for the common benefit, and claims for the owners such amounts of money respectively as their values bear in proportion to the value of the cargo sacrificed, and avers that upon a proper adjustment of the general average the sum due from the vessel is \$177.29, and for the freights \$3.75.

The answer put in by the respondents denies none of the material allegations of the libel, but submits that on the facts stated the libellants are not entitled to a decree, for the reason that they participated in and assented to the stowing

of a portion of the cargo on deck, and that, by the American law in admiralty, there is no contribution in general average allowed for a deck load thus jettisoned.

The libellants have properly submitted the legal question to the determination of the court before proceeding further with the cause.

The precise question is whether cargo which the shipper and master have both agreed shall be carried on deck is, as between them, the subject of general contribution. It is difficult, on principle, to perceive why it should not be so, although the books abound with decisions to the contrary. The cargo is taken on deck for the purpose of earning freight. If jettisoned for the preservation of the vessel, why should she not contribute for its loss? But the question is not an open one here. In a case of these same libellants against the schooner Sallie C. Morton, decided in this court during the June term, 1879, (2 New Jersey Law Journal, 301,) I had occasion to inquire, with some care, whether the owner of a deck load, which had been thrown overboard in a storm for the common safety of the vessel and the other cargo, could demand a contribution in general average from the property benefited by the sacrifice, and, in the midst of many conflicting authorities, I reached the conclusion that where the custom of the particular trade warranted the stowage of the lost cargo on the deck, or where there is an agreement between the master and shipper as to the deck stowage, the vessel might be held by a proceeding *in rem* for her contribution for the loss. These propositions are supported by the following cases: *Gould v. Oliver*, 4 Bing. (N. C.) 140; *Milward v. Hibberts*, 3 Ad. & El. (N. C.) 121, Lum. 406; *The Delaware*, 14 Wall. 602; *Johnson v. Chapman*, 19 C. B. (N. S.) 563; *The Watchful*, 1 Br. Ad. 469.

There must be a decree for the libellants, on the pleadings, and, if the parties are not able to agree upon an adjustment of the average without a reference, the case must go to the clerk, as commissioner, to ascertain and report.

NOTE. See *Wood & Co. v. Phoenix Ins. Co.*, 1 FED. REP. 235.

THE SHORT CUT.

(District Court, W. D. Pennsylvania. March 17, 1881.)

1. "CLERK"—PENN. ACT OF APRIL 20, 1858.

The "secretary and superintendent" of a corporation, who "had charge of the fitting and building" of a boat for such corporation, is not a "clerk" within the meaning of the Pennsylvania act of April 20, 1858, (1 Purd. 97,) relating to boats navigating the rivers Allegheny, Monongahela, and Ohio.

2. MASTER OF VESSEL—LIEN FOR WAGES.

The master of a vessel has no lien in admiralty for his wages.

3. SAME—STATUTORY LIEN—INTERVENTION.

Such master cannot by intervention avail himself of the original libel, in order to obtain the benefit of a statutory lien which has expired by limitation

4. SAME—FAILURE TO PAY FOR STOCK—DEBTS OF THE VESSEL.

The failure of such master to pay for his stock in the corporation owning the vessel will defeat his claim for wages in advance of the payment of the debts of the vessel.—[Ed.]

In Admiralty.

Sur Exceptions to the Commissioner's Report Distributing Proceeds of Sale.

William M. McElroy, for exceptions.

John S. Lambie, for report.

ACHESON, D. J. The exceptant, R. H. Palmer, Jr., claims to be paid, out of the proceeds of the sale of the steam-ferry-boat Short Cut, \$288, "for his services as clerk," from March 2 to June 23, 1880, and \$204.88, the balance of his wages as master, from June 23 to October 6, 1880.

The evidence, however, shows that the exceptant was not a clerk of the boat in any proper sense of that term. During the period covered by that part of his claim the boat was in course of construction. She was built for and owned by the Six-Mile Ferry Company, a corporation. The hull was built under contract by S. P. & I. N. Large for this company, and the company had the boat finished. The exceptant was "secretary and superintendent" of the corporation, appointed by the board of directors. He testifies that he "had charge of the building and fitting of the boat," or, as he elsewhere

expresses it, was "superintendent of the construction of the boat." It is clear that he was not a "clerk" within the meaning of the Pennsylvania act of April 20, 1858, relating to boats navigating the rivers Allegheny, Monongahela, and Ohio. 1 *Purd.* 97. Indeed, I do not understand that it is contended that he had a lien for the \$288 by virtue of that statute. He claims that he had a maritime lien against the boat. But the Short Cut was a domestic vessel, and the exceptant's services were rendered at home. If, then, his services as superintendent were of a maritime nature, (which I do not think,) he had no lien therefor. *The Lottawanna*, 21 *Wall.* 558.

It is well settled that a master of a vessel has no lien against her for his wages. *Steam-boat Orleans v. Phœbus*, 11 *Pet.* 175; 1 *Conck. Adm.* 115. The exceptant, therefore, to sustain a lien for his wages as master of the Short Cut, must rely wholly upon the Pennsylvania act above cited. But the third section of that act prescribes that such lien claimant shall commence his suit within 60 days after his wages shall have become due and owing; and the fourth section provides that any neglect or failure so to commence suit shall discharge the boat from the lien. Now the exceptant quit the Short Cut October 6, 1880; and his wages, it would seem, were then due and owing. He did not, however, commence his suit within 60 days, nor until December 14, 1880, when he filed his intervening libel in this case. But I am of opinion that his lien was then gone, notwithstanding the original libel of D. K. Calhoun in this case was filed November 15, 1880. I do not see upon what principle the exceptant can avail himself of the original libel to avoid the consequence of his delay in suing. He was not a party to the original libel, and it was not filed or prosecuted for his benefit. At any time before his intervention the proceedings might have been discontinued without his consent. As the lien was wholly statutory, it must be governed, as respects its duration, by the limitation imposed by the statute.

But if the objection just discussed could be overcome, there is an equitable ground for disallowing the exceptant's claim

for his wages as master. The debts of the boat (exclusive of his claims) far exceed the fund for distribution. They were contracted in the building, equipping, and running of the boat, and are liens under the local law. For the most part they were incurred upon the orders of the exceptant as superintendent and master. The exceptant is an original stockholder of the Six-Mile Ferry Company, holding stock to the amount of \$300 at the par value. But no part of his stock has been paid up. He testifies, indeed, that there was an understanding between himself and the company that he was to pay nothing, as he "was poor and had no money to pay for it." He adds, however, that it was his calculation to pay for his stock out of his share of the profits. Now, the capital stock of a corporation is a fund for the payment of its debts, (*Sanger v. Upton*, 91 U. S. 56,) and the corporation cannot grant to an original stockholder an immunity from liability to stock payments to the prejudice of the creditors of the corporation. *Upton v. Tribilcock*, 91 U. S. 45. If, then, there was an agreement, such as alleged, that the exceptant was not to pay for his stock, it was fraudulent in law, and void as against the creditors whom the exceptant is now opposing; and if he is too poor to pay his share of the capital stock he should not be permitted to diminish the scanty fund now for distribution, for, so far as appears, the corporation has no other property.

THE SCHOONER NIANTIC.

(*District Court, D. Connecticut.* March 25, 1881.)

1. WHARF—LIABILITY OF OWNER.

Where a vessel voluntarily takes her own berth partly at the wharf of the consignee and partly upon the unwharfed outland of a third person, and neither makes a request for a berth nor inquiry for information, and the consignee does not know of her presence at the wharf, the latter is not liable because information was not furnished the master of the changed condition of the bottom in that neighborhood since the vessel had last lain at that wharf.—[Ed.]

A. S. Cushman, for libellants.

Wooster & Torrance, for defendant.

SHIPMAN, D. J. On the third day of September, 1880, the schooner *Niantic*, whereof the plaintiffs are owners, left South Amboy in good and sound condition, with a load of coal, to be delivered to consignees at the dock of the Ousatonic Water Company, at the port "opposite Derby," which is the manufacturing village of Shelton, in the town of Huntington. The Ousatonic Water Company own two wharves on the Housatonic river, a short distance apart, one called the upper wharf and the other called the lower wharf. The land south of and adjoining the lower wharf is owned by one Nelson Hinman, is unwharved out, and is the natural sloping river bank.

The *Niantic* and her captain, Lyman R. Beebe, had theretofore made frequent trips to Shelton, and had lain safely at the lower wharf. The last previous trip was made in May, 1880. The tide ebbs and flows in the Housatonic river. At high tide there is enough water; at low tide, vessels of seven feet draught lying at the wharf always ground. Previous to September, 1880, the *Niantic*, lying in front of the wharf, had always grounded, but the bottom was level, and she had always lain safely. Between May, 1880, and September, 1880, the defendant, in order to make a deeper berth in front of the lower wharf, dredged out the bottom, but did not dredge but a few feet, if any, below the south line of the wharf, and in front of the said land of said Hinman. There is no evidence that the berth in front of the wharf was not sufficiently level for vessels to lie there in safety.

The *Niantic* reached Shelton about 3 o'clock in the afternoon of September 6th, at high water. The tide had begun to ebb. The next high tide was about 4 o'clock A.M. A schooner called the *Florence* was occupying the front of the lower wharf, and was discharging her cargo. The captain of the *Niantic* reported to his consignees, and was told that the *Florence* would probably be through by noon of the next day. He moored his vessel below the *Florence*, his bowsprit extending over the stern of the *Florence*, and the stern of the *Nian-*

tic being being about 32 feet below the south end of the wharf, and opposite the land of said Hinman. The Niantic was 100 feet long, and drew, when loaded, eight feet of water. The Florence was about 75 feet long and 27 feet broad. The Niantic had not previously lain so far below the end of the wharf by eight feet. Captain Beebe did not know that any dredging had taken place. He asked nobody where he should moor his vessel. No officer or agent of the defendant was present when he moored, and there is no evidence that any such officer or agent knew that he had moored, or was at the wharf. Apparently there is no wharf master or other person in charge of either of these wharves. It was low water at about 8 o'clock in the evening. The captain knew nothing of any injury to his vessel during low water, or during the night, but when he came on deck the next morning, about 6 o'clock, he found that she was leaking, and soon after that she was strained and broken amidships. She filled with water and sank. Afterwards the cargo was discharged, and she was raised and repaired with considerable expense and delay. At low water there were two and one-half feet of water under her stern. From that point the water increased in depth until it was six and one-half feet deep abreast of the main rigging. At the forward rigging there were four and one-half feet. There was a gradual slope from the main rigging to this point. It did not appear that the Niantic could not have lain safely at the upper wharf. If the captain had known of the uneven character of the bottom, there is no question that he could have found a safe place to lie in. The accident was caused by the fact that she was lying too far below the wharf, so that her stern was in shallow water, where there had been no dredging. When she grounded she lay unevenly, her stem and stern being upon elevations, and she became strained amidships. At low water the fact is apparent that the dredging had not been continued far enough to make a good berth at that point.

The foregoing facts do not, in my opinion, make the defendant liable for the injury. The defendant is a riparian proprietor upon a navigable stream, and has a right by the

law of Connecticut to wharf out in front of its land to the channel, provided navigation is not impeded, (*East Haven v. Hemingway*, 7 Conn. 186; *Nichols v. Lewis*, 15 Conn. 137; *Frink v. Lawrence*, 20 Conn. 117; *Simons v. French*, 25 Conn. 346,) and to provide in front of its wharf a safe and convenient berth for vessels. It does not appear that it had not provided such a berth. If the injury had happened by reason of the unsafe condition of the land in front of the wharf, or of the unsafe condition of the access to such landing-place, which was known to the defendant and not to the plaintiffs, and was negligently suffered to exist, and of which no notice was given to the plaintiff, he using due care, the defendant would be liable. *Carleton v. Steel Co.* 99 Mass. 216. *Barrett v. Clark*, 56 Me. 498.

If the Niantic had been assigned by the defendant the place which she took, and had received an injury from the inequalities of the bottom, the defendant would have been liable. If a wharf master of the defendant had knowingly permitted the Niantic to occupy a berth known to be unsafe, though partly on land of a third person—the captain being ignorant of its unsafe condition—the rule is apparently the same. It would have been the duty of the wharfinger to give information of inequalities of the bottom which endangered the vessel. *Sawyer v. Oakman*, 7 Blatchf. 290.

When the Niantic voluntarily takes her own berth, partly upon the unwharfed out-land of a third person, and neither makes request for a berth nor inquiry for information, and the defendant does not know of her presence at the wharf, there is no liability because information was not furnished of the changed condition of the bottom in that neighborhood. Had the defendant, knowing the fact that the vessel was at the wharf, but not knowing where she was placed, been silent in regard to any change, a question would have arisen which is not in this case. The defendant being absent, and the libellant's captain making no attempt to gain information by soundings or by inquiry of any person, the charge of negligence rests upon him rather than upon the wharfinger.

The defendant, at the suggestion of the court, offered but

little evidence on its part, and left the question, so far as the present trial is concerned, mainly one of law, upon the testimony of the libellants.

The libel is dismissed, with costs.

THE J. S. WOODWARD.

(*District Court, N. D. New York. March 5, 1881.*)

1. CANAL-BOATS—LIBEL FOR WAGES—REV. ST. § 4251—ENROLLMENT ACT OF 1793—ACT OF APRIL 18, 1874.

Section 4251 of the Revised Statutes, (9 St. 38,) which provides that "no canal-boat, without masts or steam-power, which is required to be registered, licensed, or enrolled and licensed, shall be subject to be libelled in any of the United States courts for the wages of any person who may be employed on board thereof, or in navigating the same," is not abrogated by the act of April 18, 1874, (18 St. 31,) which provides that the enrollment act of 1793 (1 St. 305) shall not be so construed as to extend the provisions of the latter act to such canal-boats.—[Ed.]

In Admiralty.

Williams & Potter, for libellant.

Davis & Clinton, for respondents.

WALLACE, D. J. This libel has been filed upon the erroneous assumption that an exemption from seizure upon process *in rem* in the courts of the United States, conferred by the act of July 20, 1846, upon all canal-boats liable to such process, has been abrogated by the act of April 18, 1874, in construction of the enrollment act of 1793.

In 1846, by the accepted construction of the enrollment act of 1793, all canal-boats which were employed on navigable waters were required to be enrolled and licensed.

In 1845 (act of February 26) jurisdiction in admiralty was extended over vessels of 20 tons burden and upwards, enrolled and licensed for the coasting trade, employed in commerce upon the lakes and navigable waters connecting the lakes. Thus, in 1846, all canal-boats which, from the char-

acter of the navigation in which they were employed, were subject to be libelled in admiralty, were required to be enrolled and licensed. It was then deemed expedient to abrogate the remedy *in rem* for wages, and apt words were employed in the act of July 20, 1846, to abrogate it as to all canal-boats without sails or steam-power which were liable to be libelled. From that time to this it has never been supposed that any ordinary canal-boat could be libelled for wages. The act of 1846 abrogates the remedy by libel as to all such canal-boats without masts or steam-power, describing the class to consist of such as "are *now* by law required to be enrolled," etc., thus excluding the inference that any future modification of the enrollment act should affect the exemption. This language is broad enough to comprehend all canal-boats which could properly be libelled.

Section 4251 of the Revised Statutes of the United States is a re-enactment of this act of 1846. There had been no alteration of the enrollment act from 1846 to the time of the revision of the statutes in any way affecting the exemption, consequently the terms of description of the class exempted, used in 1846, were just as appropriate in 1873. Reading section 4251 in the light thus thrown upon its meaning, it exempts from being libelled for wages any canal-boat of the class which at the time of the revision of the statutes was required to be enrolled and licensed. It is not claimed this canal-boat is not within that class.

The libel is dismissed, with costs.

THE BRISTOL.

(District Court, E. D. New York. March 1, 1881.)

1. EXCEPTIONS TO LIBEL—BILL OF LADING—DAMAGE BY RUST.

Where a bill of lading under which tin plates were shipped contained an exception of liability for damages by rust, and an action was brought to recover damages for non-delivery in good order, in that the tin, when delivered, was damaged by sea-water, *held*, that there being no averment that the rust was caused by negligence on the part of the carrier, and rust being the necessary damage to such merchandise from sea-water, and excepted by the bill of lading, the libel shows no cause of action.

In Admiralty. Exception to Libel.

Sidney Chubb, for libellant.

Foster & Thomson, for respondent.

BENEDICT, D. J. The exception to the libel is well taken. The libel sets forth a bill of lading, containing, among other things, an exception of liability for rust. It avers a shipment under the bill of lading of certain tin plates in good order, and a failure to deliver the plates in like good order, in this, that the tin when delivered was damaged by sea-water. This is equivalent to saying that the tin when delivered was damaged by rust,—rust being the necessary if not the only damage capable of being produced in merchandise of this description by contact with sea-water. Damage by rust having been excepted by the terms of the bill of lading, the libellant, in order to recover, must aver and prove that the rust upon the tin was caused by negligence on the part of the carrier. This libel contains nothing to show that the rust was caused by negligence on the part of the carrier, and it fails, therefore, to set forth a cause of action.

The exception is allowed, with leave to the libellant to amend, on payment of costs.

THE EFFIE J. SIMMONS.

(District Court, D. Massachusetts. April 15, 1881.)

1. TUG AND TOW—NEGLIGENCE.

A tug is bound to know the nature of the bottom of the stream and the depth of the water in which it is employed.

2. SAME—SAME.

A schooner, while being towed up the Charles river, as the tide was running out, grounded with her head up stream, in such a position that she would probably have sustained no injury if she had not been disturbed. The tug, however, attempted to haul her off, and finally left her with her stern fast where it first touched, but her head projecting into the channel, where the bottom was sufficiently uneven to cause her to strain and break. *Held*, that the tug was in fault in thus attempting to pull the vessel off.—[ED.]

F. Dodge and E. L. Dodge, for libellant.

Frank Goodwin, for respondents.

NELSON, D. J. The respondents undertook, by their tug-boat, the Charles River, to tow the schooner Effie J. Simmons, laden with coal, up Charles river, from Crague's bridge to Henderson's wharf, in Brighton. As the depth of the channel at high water is only 12 feet, and the draught of the schooner, as she was loaded, was $11\frac{1}{2}$ feet, this could be done only at or very near high water. On the passage up the river the schooner grounded and sustained injury. The accident seems to have occurred in this way: When the two vessels reached a point in the river opposite Gouch's wharf, the tide having then begun to fall, the tug slackened her speed, and passed a little to the south of what may be called the low-water channel of the river, in order to avoid another vessel then lying moored to the northerly bank with an anchor out into the stream. Where the schooner passed the water had slightly diminished in depth, and her stern touched bottom and stuck fast. The bottom at this point, up and down the stream, was smooth and even; and if the schooner had been left in the position she was in when she touched,—that is, headed directly up the stream,—she would have rested, as the tide fell, evenly on the whole length of her keel, and in all

probability would have suffered no injury. But the tug attempted to get her off by hauling her head round towards the northerly bank, and, not succeeding in accomplishing this, finally left her with her stern fast where it first touched, and her head projecting into the channel, where the water was slightly deeper. As the tide receded the schooner was left lying across the edge of the channel, where the bottom was sufficiently uneven to cause her to strain and break. It seems to me that this was negligence in the tug. The fault was not in the grounding of the schooner, but in the unwise measures taken to pull her off after she had grounded.

It appeared that it is usual for vessels to lie aground in the river at this and other points, but always with the stream, in which direction the bottom is smooth and even, and never across the channel, as in this case. The tug was bound to know the nature of the bottom as well as the depth of the water, and it was through her ignorance of both, or her carelessness, that the schooner was left in her position, where she was sure to sustain injury.

It also appeared that the schooner was slightly injured in passing through one of the draw-bridges on her way up the river. The respondents admitted their liability for this injury, and it is to be included in the assessment of damages.

Interlocutory decree for libellant.

SULLIVAN and others v. ANDOE and others.

(Circuit Court, D. Maryland. April 5, 1881.)

1. DECEDENT'S ESTATE—DISTRIBUTION—FRAUD.

A bill in equity was filed by certain aliens, residing in Ireland, claiming to be the next of kin of an intestate who had died in St. Louis, seeking to set aside a distribution of his personal estate made by his administrators under orders of the probate court of St. Louis. The proof showed that the distribution was procured by fraud, and that the persons to whom the estate had been distributed were not the intestate's next of kin, and that the complainants were.

Held, that the distribution of the probate court having been procured by fraud, should be set aside and the fund brought into this court.

2. LUNATIC—PROCESS—SERVICE ON COMMITTEE.

The only one of the persons to whom the estate had been distributed, found within the district, was a lunatic, to whose committee one-fourth of the estate had been paid. She had been returned summoned by service on her committee, and he had appeared and fully answered, and on her behalf, with the assistance of able counsel, had resisted the claims of the complainants. After taking testimony in Ireland and several of the United States for over two years, the case came on for final hearing. The lunatic had been for about 30 years in an insane asylum in the district, and had been found *non compos* by a jury, and so adjudged by a competent state court, which appointed her committee.

Held, under the circumstances, that service of the subpoena on the lunatic by service on the committee was sufficient, and that the answer of the committee should be taken and treated as the answer of the lunatic.

3. LACHES.

Held, under the facts of the case, that the complainants had not lost their right to relief by delay.

4. DECEDENT'S ESTATE—ADMINISTRATION—PARTIES TO PROCEEDINGS.

Held, that the children of a brother of the intestate, who died after the intestate, could sue as complainants, and that administration could be taken, after the fund sought to be recovered was brought into court.

5. LUNATIC—FUND IN HANDS OF COMMITTEE—JURISDICTION.

Held, that the fund in the hands of the committee was not in the custody and possession of the court which appointed him in such sense that no other court could adjudicate with regard to the title to it.

In Equity. Before BOND and MORRIS, JJ.

v.6,no.7—41

Willoughby N. Smith, Robert G. Keene, John Henry Keene, Jr., and Archibald Stirling, Jr., for complainants.

J. T. Mason, R., and S. T. Wallis, for defendants.

MORRIS, D. J. This is a bill in equity filed by certain aliens, residing in Ireland, claiming to be the next of kin of Edward Sullivan, deceased, late of the city of St. Louis, in the state of Missouri, and entitled to his personal estate, charging that the sums of money obtained by certain of the defendants in a distribution of his personal estate heretofore made by the probate court for the city of St. Louis were obtained by fraud practiced upon that court, and praying for a decree setting aside that distribution and compelling the defendants to bring into this court the money received by them, to the end that the complainants may receive what they claim belongs to them.

It appears that in 1866 Edward Sullivan died in St. Louis, unmarried and intestate. He was found dead in his room, and the coroner was about to have his body interred at the public expense, when it was discovered, through John Maguire, an agent who had been employed by him in the management of his property, that he was a person of considerable fortune. Maguire was subsequently appointed, by the probate court of St. Louis, his administrator, settled his debts and funeral expenses, and distributed the residue of his personal estate under orders of that court.

To procure that distribution, a certain Henry Murta, (now dead,) then residing in the state of Pennsylvania, filed in said probate court his affidavit, dated January 30, 1869, in which he swore that he was a second cousin of the deceased; that the intestate had come to this country from Ireland, and never had a brother, and had had but one sister, who had died in Ireland, at the age of 45 years, unmarried; that the father, mother, grandfather and grandmother, uncles and aunts of the intestate had long been dead; that the only one of his uncles or aunts who had left descendants was an uncle named Matthew Andoe; that the only child of this Matthew Andoe living at the death of the intestate was a certain Rosanna Andoe, a lunatic, then about 65 years of

age, and an inmate of Mount Hope insane asylum, near the city of Baltimore, in the state of Maryland; that said lunatic had had a sister, Ann Andoe, who had married, in Ireland, a certain John Murta; and that he, the affiant, (Henry Murta,) was their son; that there had been other children of said marriage besides himself, but that none of them were ever married, and all but himself were dead at the date of the death of the intestate, except, perhaps, a brother of the affiant, named Matthew Murta, who went to Australia in poor health, in 1858, and who had not been heard from since 1858, when he had written to affiant, at Pittsburgh, that he was going from Australia to South America on account of his ill health, where affiant believed he had died; that affiant had had a cousin named Eliza Murta, who was last heard from in 1858, when she left Darlington, in the state of Pennsylvania, and had not since been heard from; that said Rosanna Andoe (the lunatic) and himself (the affiant) were the only living persons entitled to share in the distribution of the intestate's estate, unless the said Matthew Murta and Eliza Murta were living.

Two other affidavits only were filed. One James Creamer, who had known Henry Murta and his family in Ireland, made affidavit that he, the affiant, had come to this country about 19 years before, and that he believed that Henry Murta was the only living child of his parents, and that there were no descendants of any other, and that he had never heard of any relatives of the intestate except Rosanna Andoe and the said Henry Murta. One David D. Lynch made affidavit that he knew the Murta family in his boyhood in Ireland; that from what he knew he believed Henry Murta's parents were dead, and all his brothers and sisters had died without living descendants, and that said Henry Murta and the said Rosanna Andoe were the only living relatives of the intestate.

Upon these three affidavits, presented to the court by counsel, representing Henry Murta and Rosanna Andoe, a partial distribution of the personal estate was made by the administrator on February 6, 1869, under order of the court, and

\$3,000 was paid to the committee of Rosanna Andoe and the like sum to Henry Murta.

Shortly after this it appears that the widow of Edward Murta, a brother of the above-named affiant Henry Murta, saw in a newspaper some mention of this distribution, and she immediately caused affidavits of numerous witnesses to be filed in said probate court, establishing the fact that her husband, who had died in 1865, was a brother of Henry Murta; that she had been married to him in Pittsburgh in 1850, and that they had lived there continuously, and had four children who were living.

It appeared from the affidavits that Henry Murta, whose residence had been in Pittsburgh and St. Louis, and who, in his affidavit, had failed to mention this brother or his children, had from time to time lived in the same house with them in Pittsburgh, and a physician made affidavit that in December, 1859, he had attended Henry Murta during an illness at Edward Murta's house. Upon the showing made by these affidavits the children of Edward Murta were admitted without opposition to share in the estate, and a further distribution was made of \$4,000 each to Henry Murta and the committee of Rosanna Andoe, and \$1,750 to each of the four children of Edward Murta. These sums were paid by the administrator under an order of the court, dated fourteenth of June, 1869. On the twenty-seventh of September, 1869, there was a final settlement by the administrator, in which the committee of Rosanna Andoe received the further sum of \$5,069.65.

The present suit was instituted in January, 1879, by Emily Sullivan, claiming to be a sister of the intestate, and by the son and daughter of John Sullivan, deceased, alleged to have been a brother of the intestate. These complainants claim that they are the persons and the only persons who, as his next of kin, had any right to the intestate's personal estate. The defendants in this suit are Rosanna Andoe, the lunatic; John T. Mason, R., her present committee; Elder, a former committee; Merryman, administrator of Scott, a deceased committee; the executor of Henry Murta, who is now

dead; the four children of Edward Murta, and their guardian; and Maguire, the administrator of Edward Sullivan. The only defendants who have been summoned are Rosanna Andoe and Mason, her present committee; Elder, her former committee; and Merryman, the administrator of the deceased committee. The other defendants are now residents of this district, and have not been summoned, nor have they appeared or answered.

The proof which the complainants have produced convincingly establishes the relationship claimed by them to the intestate, Edward Sullivan. The family history of the intestate, and of his five brothers and one sister, is clearly proved by the testimony of numerous witnesses examined under a commission sent to Ireland, and they are corroborated in many essentials by the production of a copy of the will of the mother of the intestate, dated in 1838, in which the intestate is mentioned by name, and described as residing in Pittsburgh, in America, and the testator's nephew, John Andoe, is also mentioned as residing at Pittsburgh. Special provision is made for the support of the testator's only daughter, the complainant Emily Sullivan, who was then and now is both deaf and dumb; and the other sons of the testatrix, brothers of the intestate, are also mentioned.

It also clearly appears, we think, from the proof, that Henry Murta, in the affidavit he made on the thirtieth of January, 1869, to procure the distribution ordered by the probate court of St. Louis, was guilty of many false statements and suppressions of the truth. It was not true, to begin with, that Matthew Andoe, his maternal grandfather, through whom he traced his relationship to the intestate, was the intestate's uncle, as he alleged. It was true, however, that his maternal grandmother was an aunt of the intestate. It was not true that his own mother, through whom he traced his kinship, was dead. She was then living in Ireland, and did not die until 1874, and letters had been received by her from him in 1866. The account he gave of the death of his own brothers and sisters was not true. Several of them were then living in Ireland, and also quite a number of his cousins, who

were as nearly related to the intestate as himself. He had himself been to Ireland on a visit in 1851 or 1852, and quite a number of the witnesses examined under the Irish commission say they then saw and talked with him. These were persons familiar with the family history of the intestate, and of the complainants' relationship to him. It appears further that he could not possibly have been ignorant of the existence of the children of his brother Edward, who were all living in Pittsburgh; and upon them coming forward and making claim, their rights were at once recognized without opposition from him. The falsity of his affidavit with regard to his own immediate family and relatives, swearing as he did to the death or non-existence of persons he well knew, and had no reason to suppose to be dead, lead to the conclusion, when considered in connection with his opportunities of knowledge, that when he undertook to swear that the intestate never had had a brother, and never had but one sister, and that she had died unmarried, he either swore to matters of which he had no knowledge or information whatever, or, as seems more probable, he was suppressing information which he had or could easily have obtained, and that he did so to deceive the probate court and procure the distribution in his favor.

The fact that Edward Sullivan, the intestate, was living at Pittsburgh, in America, and that he was a wealthy man, was known to persons with whom the affiant talked during his visit to Ireland in 1851 or 1852, and they knew that he came from the same city in the United States in which the intestate resided, and they knew of the existence of the complainants, and of their relationship to the intestate, and it is highly improbable that he could, after talking with them, have remained ignorant of the existence of the complainants. Another circumstance which throws light on his attitude towards this large estate, and his want of confidence in his claim to share in it, is the fact that it appears that he had made a contract with the attorneys who represented him in the distribution by which they were to receive one-half of all they obtained for him.

We are satisfied that the complainants have established their kinship to the intestate, and their right to be recognized as entitled to his personal estate, and that the persons to whom it was distributed had no right whatever to it, and that the distribution made was procured by fraud practiced upon the probate court by Henry Murta, one of the distributees.

Finding the equity of the case to be with the complainants, it remains to examine the objections of a technical character to granting them relief which have been ably urged by counsel who have appeared on behalf of the committee of the lunatic and zealously represented her rights. The jurisdiction of this court, sitting in equity, to grant relief in cases where there has been fraud in obtaining judgments or decrees in other courts, where the fraud is clearly proved, is not seriously questioned, and we take it to be fully established. *Gould v. Gould*, 3 Story, 516; Story's Equity, 252a.

The committee of the lunatic was represented in the distribution by the same counsel who represented Henry Murta, and her claim rested entirely on the affidavits hereinbefore mentioned, which were filed on his behalf; so that, although her committee, and of course she herself, were in one sense innocent of participation in misleading the probate court, they reaped the fruits of Henry Murta's conduct, and have no better title to the money distributed to her than he had to the sums which he obtained.

The points principally relied upon by counsel for the committee are as follows:

First. It is objected that Rosanna Andoe, the lunatic, has not been summoned. Process was prayed against her, and also against her duly-appointed committee, who is at present acting for her. The subpoena against her was returned served by service on her committee. Her committee, although not answering in her name, has answered fully in his character of committee, and has presented every defence which he could have presented if answering in her name, and he has stubbornly resisted the pretensions of the complainants, and has been assisted by able counsel in defending his rights.

This he has done under the sanction of the state court which appointed him, and the expense has been by order of that court paid out of the lunatic's estate. The lunatic herself is and has been for some 30 years an inmate of an insane asylum in this district, and service of process on her personally would have availed nothing. It would have been more regular to have applied to this court to appoint some one to answer and defend the suit for her, in accordance with the eighty-seventh equity rule; but, unquestionably in this case, the court would have appointed her present committee, and the very same answer would have been filed. If there was any reason to suspect that the committee who has defended her interest had not done his whole duty, or had any interest opposed to hers, the court would not be slow to require a separate answer to be filed on her behalf by some one specially appointed to defend her; but to do so in this case would be to do an utterly nugatory act in a case in which the point is now for the first time raised on final hearing, after taking testimony on both sides for two years at great expense.

It seems to us proper in this case that the answer filed by her committee should be treated and taken as the answer of the lunatic.

Second. It is urged that the complainants are barred of their relief by limitations, lapse of time, laches, and delay in filing their bill. What will constitute such a bar as to a claim purely equitable must depend upon the facts and circumstances of each case. 1 Story's Equity, 64a; *Hanson v. Worthington*, 12 Md. 441; *Syester v. Brewer*, 27 Md. 319; *Etting v. Marx*, 4 Fed. Rep. 673.

It is to be noticed that the complainants are aliens residing in Ireland; that one of them is a person deaf and dumb from her youth. So far as we can gather from the record it does not appear that any notice was published, pending the administration in the probate court, warning the next of kin of the intestate to appear as claimants of the estate. They first obtained knowledge of the death of the intestate in 1874. In 1876 they filed a bill in one of the courts of St. Louis to

set aside the distribution for fraud. None of the parties who had received distributive shares of the estate resided in the state of Missouri, and they could not be served with process, and it was found that the administrator was protected by the order of the probate court. The complainants then dismissed that bill, and finding in this district the lunatic and the money distributed to her, they filed this bill in January, 1879. Considering the difficulties in the way of the complainants, and that the defendant has been in no way prejudiced by the lapse of time, we do not see any reason why, in a case in which the equities are so plain, the defence of laches should prevail.

Third. It is urged that the proper parties have not been made complainants. It is objected that even if it is admitted that the complainants have established their relationship, and that the complainant Emily Sullivan is a sister of the intestate, and that the complainant Mary Mowlds and her brother, Jeremiah Sullivan, are children of John Sullivan, a deceased brother, yet as the testimony shows that John Sullivan died in London in 1867, after the death of the intestate, the administrator of John Sullivan should be the complainant claiming his interest and not his children. Conceding it to be true that the administrator is the proper party to receive the distributive share of John Sullivan, we still have one of the complainants with an undoubted standing in court, and as, until the decision of this suit, it could not be known whether or not there would be assets of John Sullivan, in Maryland, requiring administration, and as the administration would have to be taken out in Maryland, we think the persons presumably, equitably, and beneficially entitled to his estate may, with the other complainant, in a suit of this character, be allowed to represent his interest in the fund sought to be recovered. There can be no difficulty in now requiring administration on the estate of John Sullivan, and in allowing his Maryland administrator, or indeed any other parties who might prove themselves entitled to any distributive share of the fund to be recovered, from coming in and sharing in the benefit of any decree.

Fourth. Another defence set up is that the fund sought to be affected by a decree in this case is in the possession and control of the circuit court of Baltimore city, which appointed the committee of the lunatic, and that, therefore, every other court is excluded from adjudicating any question with regard to it. Rosanna Andoe was found in 1869 to be of unsound mind, under a writ *de lunatico inquirendo*, issued by the circuit court of Baltimore city, and, upon the ratification of the return of the writ, that court, exercising equity jurisdiction, appointed two persons committee of her person and estate. The fund now sought to be reached was paid to them by the administrator of Edward Sullivan, the intestate, and has been invested and held ever since, first by the committee so appointed, and subsequently by the present committee, who succeeded them in that office. Whatever that court as a court of equity, upon a proper bill filed therein, or any other court of equity, could decree with respect to the ownership of that fund, this court, having all the equity jurisdiction that appertains to any court, can in like manner decree. *Payne v. Hook*, 7 Wall. 430. The complainants might have filed their bill for relief in the court which appointed the committee, but they were under no obligation to do so, because, being aliens, the constitution and laws of the United States have given them the right to choose the federal court.

We do not think the proposition can be maintained that property held by a committee of a lunatic is to be considered in the custody and possession of the court which appointed him, and to which he is accountable for its management, in such sense that no other court can adjudicate with regard to the title to it, or any trust to which it may be subject. The unjust results of such a doctrine are obvious and at once suggest themselves. The power to appoint such a committee might, by the legislature, be conferred upon any court of the state, and should the committee so appointed obtain possession, by color of his office, of any property, real or personal, no matter to whom belonging, the true owner could not recover it except by petition to that court; and, no matter how deficient that court might be in jurisdiction or machinery to

try the question of title, it could not be tried elsewhere except by the allowance and permission of that court. The lunatic and her committee are both parties to this case; the committee has defended it on her behalf, with the sanction of the state court which appointed him, and they are both bound by any decree passed herein, and we think the fruits of that decree should be realized without special difficulty.

In our judgment the complainants have shown themselves to be entitled to the relief prayed for, and we will sign a decree in proper form establishing their rights, and directing that the fund affected by the decree be brought into this court for the benefit of the parties entitled to it.

KNEVALS v. HYDE.

(Circuit Court, D. Nebraska. ———, 1881.)

1. ACT OF CONGRESS, JULY 23, 1866—BONA FIDE PURCHASER.

Under the act of congress of July 23, 1866, the equitable ownership of the land vested in the St. Joseph & Denver City Railroad Company upon filing the map of the location of the road with the secretary of the interior, and a patent thereafter issued by the United States conferred no title on a *bona fide* purchaser without notice of the location of the road.

2. RIGHT TO DECLARE FORFEITURE.

The right to declare a forfeiture of the land for breach of condition by the company, and resume the grant, belongs to the United States, and cannot be taken advantage of by such purchaser.

In Equity. Demurrer to Original Bill.

In 1866 congress made a grant of land to the state of Kansas to aid in the construction of the St. Joseph & Denver City Railroad, which road was to run from Elwood, in Kansas, via Maryville, to a junction with the Union Pacific Railroad, or any branch thereof. In pursuance of the terms of the grant the company filed a map of its line with the secretary of the interior on the twenty-eighth of March, 1870. This map was transmitted to the local land-office at Beatrice, where it was received on the thirteenth of April following. On the elev-

enth of April one Cropsey entered one quarter section included in the grant, and afterwards a patent therefor was issued to him. Knevals claims under the railroad company, and Hyde under Cropsey, and the first question arising in the case was whether the grant to the company took effect when the map was filed with the secretary of the interior, or when it was received by the local officers. The grant contained the condition that the road should be built to a junction with the Union Pacific Railroad, or one of its branches, within ten years. The road was built to a junction with the Burlington & Missouri River Railroad in Nebraska within the time limited, but not to the Union Pacific, and it was objected by the defendant that the Burlington was not a branch of the Union Pacific, and therefore that the condition had been broken and the lands forfeited. It was also objected that Cropsey was a *bona fide* purchaser without notice of the location of the railroad, and therefore was entitled to protection against its claims.

J. M. Woolworth, for plaintiff.

E. Wakeley, for defendant.

MILLER, C. J. 1. I am of the opinion that within the meaning of the first section of the act of congress of July 23, 1866, (chapter 212 of that session,) granting lands to the state of Kansas for the use and benefit of the St. Joseph & Denver City Railroad Company, "the line or route of the road" was "definitely fixed" when on the twenty-eighth of March, 1870, a map of said location, adopted by the board of directors of the company, was received by and filed with the secretary of the interior as the law required. It follows that on that day the right to the use and benefit of the sections of land designated by odd numbers, within 10 sections on each side of that line, became vested in the company, including the quarter section now in controversy, unless it had been previously sold, or otherwise came within the excepting clause of the act.

2. The origin of defendant's adverse title is a purchase made from the United States through its land officers 14 days after the rights of the company had vested. The equitable

title to the land had therefore vested in the company before any interest in it whatever had come to Cropsey, the grantor of the defendant.

3. The rights of the parties in this case are not affected by the question of notice. No other notice was required of the company than filing its map with the secretary of the interior. No other act was necessary on the part of the company to establish its right to the land. No other act could be done by the company towards perfecting the title until so much of the road was built as authorized it to apply for patents for the land. And it will scarcely be contended that until the patents issued any location by purchase from the government could come in and take it up as vacant land. It is probable that the strict legal title passed to the state of Kansas for the use of the company by the act of filing the map, and related back to the date of the statute, which makes a grant to the state *in presenti* of lands to be ascertained by the act of locating the route of the road. But it is sufficient to say that on the filing of the map there was vested in the company the equitable ownership of the land—an equity which could only be defeated by failure to perform the conditions of the grant. The power in the offices of the land department to sell the land was gone, and the patent issued by them conferred no real right, though it gave an apparent title. It is not a case, therefore, of notice, but a case of priority of right, in which the prior right must prevail. If it were otherwise, the filing of the map in the office of the commissioner of the general land-office at Washington, the only notice the company could give, was sufficient to require Cropsey to take notice of it.

4. With the question of forfeiture, by reason of failure to complete the road, neither defendant nor his grantor has anything to do. They cannot declare such a failure, nor does a loss of the title arise as a legal consequence out of such a failure. The sale to defendant's grantor was not intended to assert such a forfeiture, because at the date of that sale no ground of forfeiture existed. This court, however, has settled the doctrine that in cases of this class the right to

declare the forfeiture and resume the grant belongs to the United States, and can only be made effectual by an act of congress or a judicial proceeding. *Schulenburg v. Harriman*, 21 Wall. 44. The allegations of the bill demurred to make a case, therefore, in which complainant, being the equitable owner of the land, finds himself embarrassed by an apparent legal title in defendant, and therefore entitled to relief in a court of equity.

The demurrer to the bill is therefore overruled, with leave to defendant to answer within a reasonable time, to be filed by the court.

FALLS WIRE MANUF'G Co. v. BRODERICK.

(Circuit Court, E. D. Missouri. March, 1881.)

1. REMOVAL—COUNTER CLAIM—AMOUNT IN DISPUTE—ACT OF MARCH 3, 1875.

The claim of the plaintiff, and not the counter claim of the defendant, should fix the amount in dispute, in determining the right to remove a cause from the state court under the act of March 3, 1875.

Clarkson v. Manson, 4 FED. REP. 257, *contra*.—[ED.]

Motion to Remand.

Louis R. Tatum, for plaintiff.

Noble & Orrick, for defendant.

TREAT, D. J. The plaintiff, an Ohio corporation, brought suit in the state circuit court for less than \$300, the defendants being citizens of Missouri. The defendants appeared (February 8th) and filed an answer and counter claim. The counter claim is based on an alleged contract in writing, for the non-performance of which the defendants have sustained damages (unliquidated) in the sum of \$1,000. No written contract was filed, or *profert* thereof made. On the following day the defendants filed a petition for the removal of the cause to this court. Under the act of March 3, 1875, the defendants, though citizens of Missouri, had a right to the removal, the plaintiff being a

citizen of another state, provided the amount in dispute exceeds \$500. The plaintiff claims less than \$500, but the defendants, by way of counter claim, demand \$1,000. The Missouri statute requires that the written contract on which such counter claim is based should be filed; and under the more recent decisions of the supreme court of Missouri, if not filed, a motion to dismiss, etc., would lie. But the defendants having filed their answer and counter claim on February 8th, but not the written contract, appeared next day, February 9th, with petition, etc., for removal to this court, an order for which was duly granted. The act of 1875 provides for the removal of a civil suit "where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * * in which there shall be a controversy between citizens of different states." Hence the parties are within its terms as to citizenship. Are they as to the amount in dispute? Judge Blatchford has recently held, (*Clarkson v. Manson*,*) in a case similar to this, that, although the plaintiff's demand was for less than \$500, yet as the defendant's counter claim for judgment over was for more than \$500, the cause was removable. If that be a true interpretation of the act, the door for removals is wide open, whenever a defendant, for purposes of delay or otherwise, chooses to interpose a counter claim for more than the prescribed sum; thus drawing into United States courts the trial, through the device of a counter claim, of any cause in which the amount claimed by plaintiff, although less than \$500, is to be determined. It may be, on the other hand, that the original demand in the state court is for a small sum, while the real dispute involves thousands of dollars. How shall a United States court avoid fraud on its jurisdiction on one hand, and preserve the just right of removal on the other? Must it await the final outcome, and then render judgment as the facts may require, pursuant to the terms of section 5 of the act of 1875, by remanding or dismissing?

An important inquiry in this case arises under section 6 of said act, viz.: "That the circuit court of the United States

*Reported in 4 FED. REP. 257.

shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and said proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal." The purpose of this section is, obviously, that all proceedings after removal shall be as if the suit was originally brought in the United States circuit court, and all had in the state court before removal shall stand on the same footing. Hence, when the answer and counter claim were filed, February 8th, in the state court without the alleged contract in writing, the plaintiff could have interposed a motion for dismissal; but, as the case was removed to this court before opportunity given for such motion, his right to do so still remains. Suppose such a motion interposed here and sustained, what would be the *status* of the case? Under section 5 no dismissal of the case should be had, for the plaintiff would not be at fault. If the counter claim is dismissed, and the case remanded after such dismissal, what effect would such dismissal have, jurisdictionally, it being rendered by a court that had thus decided its own want of jurisdiction in the premises? The act of congress (section 5) provides that when it shall appear to the United States circuit court that the dispute is not properly within its jurisdiction, it "shall proceed no further therein, but shall dismiss the suit, or remand it," etc.

Hence, it seems that the first inquiry, on proper motion, is to ascertain whether on the papers, as transmitted to this court, it will remand, sustain a motion to dismiss the counter claim, or will permit the defendants here to do what should have been done in the state court. Under the later rulings of the Missouri supreme court the counter claim is subject to dismissal on motion. If such a motion is made and granted, the case will have to be remanded. The anomalous position the case will then occupy in the state court cannot be avoided.

The judgment of this court for dismissal of counter claim, if its jurisdiction is to be thus determined, may or may not prevent the state court from allowing the same to be re-in-

stated and the filing of the written contract. All this court will have decided is that the motion to dismiss the counterclaim is sustained, whereby it will have decided that it has no jurisdiction of the case, and that the same should be remanded at defendant's costs. If the motion to remand, in the present state of the record, is overruled, then, under section 5 of the act of 1875, it may appear, through proper motions, that this court has not properly jurisdiction of the case, and the order to remand may hereafter be granted. The supreme court of Missouri has held that under the state practice act *profert* is not necessary; and that advantage of the non-filing of a written contract must be taken by motion. If a case is removed to this court, without opportunity for making such a motion in the state court, and such motion is made here, will this court permit such contract to be filed here, and thus give the case here a position, jurisdictionally, different from what it had when removed? Can the removing party thus obtain jurisdiction, or escape the consequences of his position in the state court? Must he not abide by the record as it stood? Or may he assume that, as no motion to dismiss was made before removal, the case here has the same *status* as if the contract had been filed before removal? These difficulties are suggested with a view of determining the true meaning of the statute as to the amount in dispute. Under the act of 1789, the defendant, on entering his appearance, had to then file his petition for removal, and there is a long line of decisions that the amount was to be determined by plaintiff's demand. Indeed, no other criterion could be had in the then state of the record. Since then various acts of congress have granted permission to remove at other stages of the proceedings, but none has changed the rule as to the amount in dispute, or the rule by which it is to be ascertained, unless the adoption of the state practice has so done under the acts of 1872. The rules of law, as established before state practice as to counter claims existed, are familiar. Is it to be supposed that the uniform rulings of the United States court were intended to be overturned, as to removals,

by the act of 1872, independent of all the statutes and decisions concerning the removal of causes?

While the practice acts of the state may prevail as to pleadings, etc., under the United States act of 1872 they cannot enlarge or change the United States acts concerning removal of causes from state courts. The amount in dispute still continues to be what plaintiff claims, and not what by counter claim the defendant may demand.

Motion to remand sustained.

WEAR v. MAYER.

(Circuit Court, E. D. Missouri. September, 1880.)

1. WRIT OF ERROR—NOTICE—REV. ST. § 4981.

A writ of error will not be allowed from the circuit to the district court, in bankruptcy proceedings, unless the plaintiff in error shall have given the notice required by section 4981 of the Revised Statutes.

2. SAME—TRIAL WITHOUT JURY.

A judgment cannot be reviewed in the circuit court upon a writ of error, when the cause, by consent of the parties, was tried before the judge of the district court without a jury.—[Ed.]

Writ of Error.

W. L. Scott and *D. W. Wear*, for plaintiff in error.

W. B. Homer and *L. B. Kellogg*, for defendant in error.

MCCRARY, C. J. This was an action at law in the district court, brought by Mayer, as assignee in bankruptcy of one Wellington Stewart, to recover the value of certain goods alleged to have been obtained by plaintiff in error from Stewart by way of fraudulent and illegal preference. A jury was waived, and by consent of parties the issues of fact were submitted to the court, the finding and judgment were for the assignee, and the cause has been brought into this court by writ of error. The bill of exceptions shows the findings of fact by the court in the nature of a special verdict, and also sets forth certain testimony, together with the court's ruling

thereon, and exceptions to the same. Counsel for the assignee moves to dismiss the writ of error, for the reason that this court has no jurisdiction of the case. In support of this motion it is insisted that the plaintiff in error should have given notice as required by section 4981 of the Revised Statutes of the United States. That section provides as follows: "No appeal shall be allowed in any case from the district to the circuit court unless it is claimed and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within 10 days after the entry of the decree or decision appealed from, nor unless the appellant, at the time of claiming the same, shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs." In the case of *Ins. Co. v. Comstock*, 16 Wall. 266-7, the supreme court construes this section as follows: "Taken literally, the 10 days' limitation does not extend to writs of error, but the better opinion is, in view of the fact that writs of error and appeals are associated together in the first clause of the section, that the word 'appeal,' at the commencement of the second clause, means the same as 'review' or 'revision,' and that it was intended to include the writ of error as well as appeal, as the whole section seems to contemplate a more expeditious disposition of the cause in the appellate court than that described in the judiciary act, or the act to amend the judiciary system." Following this clear intimation of the supreme court, I should, even if there was no other question of jurisdiction presented by this record, feel constrained to sustain the motion to dismiss. But that motion is urged upon another ground, which I proceed to consider. It is insisted that the cause having been tried before the judge of the district court, sitting in place of a jury, by consent of both parties, the judgment cannot be reviewed in the circuit court upon a writ of error. The finding of an issue of fact by the court upon the evidence, either with or without the consent of parties, was a proceed-

ing altogether unknown in the common law; and it is well settled that, in the absence of a statute authorizing that mode of proceeding, no exception can be taken to any opinion of the court upon admission or rejection of testimony, or upon any other question of law which may grow out of the evidence where no jury is empanelled. *Campbell v. Bogueau*, 21 How. 226; *Blair v. Allen*, 3 Dillon, 101; *Kelsey v. Forsythe*, 21 How. 85; *Geld v. Frontir*, 18 How. 135; *Burr v. Des Moines, etc.*, 1 Wall. 99.

The doctrine of these cases is not disputed by counsel for plaintiff in error, and he admits that they are conclusive of the question, unless the provisions of section 914 of the Revised Statutes of the United States are applicable to and decisive of the controversy. That section provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." It is very clear that this section goes no further than to provide a general rule regulating practice and procedure in the federal courts, in the absence of any express congressional enactment upon the subject. It does not by implication repeal any previous act of congress expressly requiring a particular mode of proceeding in any given case or class of cases. Section 566 of the Revised Statutes (which, in my judgment, was not repealed by the later act embodied in section 914) provides that "the trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." Section 649 of the Revised Statutes provides that "issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury." This provision, however,

cannot be extended to proceedings in the district court, but, on the contrary, leaves in full force the statute above cited, which requires that the trial of all issues of fact in that court (with certain enumerated exceptions not material to this question) shall be by jury. It follows, from these considerations, that a writ of error does not lie, in a case like the one under consideration, to re-examine and revise the action of the district court, and the writ is accordingly dismissed for want of jurisdiction.

BARNES v. VIALI.

SAME v. STEERE.

SAME v. POTTER.

(Circuit Court, D. Rhode Island. ———, 1881.)

1. FALSE IMPRISONMENT—TRESPASS.

A judgment debtor, who has been discharged from imprisonment, either under chapter 216, Gen. St. R. I., for the neglect of the plaintiff to pay his board, or under section 5, c. 213, because not taken in execution within 30 days after final judgment against him, cannot be lawfully arrested again upon an *alias* execution, or upon *mesne process*, in an action upon the same judgment.

2. SAME—WHO LIABLE IN TRESPASS.

If, after such discharge, the defendant be again imprisoned on an *alias* execution, the plaintiff and his attorney are liable in trespass, but not the clerk, when there is nothing on the record to instruct him that the defendant had been imprisoned for more than 30 days, nor the jailer, who is protected by the precept.

3. SAME—DAMAGES.

That the defendant was illegally arrested and detained through a mistake of law, or miscalculation of time, which was shared by all the parties, is a fact which goes far in reduction of damages.

4. SAME.

Chapter 216 and section 5, c. 213, General Statutes of Rhode Island, construed.

Chas. A. Wilson, for plaintiff.

Ervin T. Case, for defendant Viall.

Dexter B. Potter, for self and defendant Steere.

LOWELL, C. J. These three actions of trespass and false imprisonment were submitted to the court without a jury. In July, 1876, the defendant Steere brought an action of trover against the plaintiff Barnes in the supreme court of Rhode Island, and caused him to be arrested on *mesne process*. The plaintiff gave bail. After several trials a verdict was rendered for Steere for a large amount, and judgment was entered for him, upon which execution was issued and returned *non est*. On the third of December, 1878, Barnes was surrendered by his bail to the defendant Viall, the jailor of the Providence county jail, and two days afterwards Barnes caused a tort citation to be issued to Steere, under chapter 216 of the General Statutes of Rhode Island, requiring him to pay the board of Barnes within ten days, which he did.* On the second of January, 1879, Barnes not having been committed on execution in pursuance of section 5, c. 213, of said statutes, required the defendant Viall to discharge him, but agreed to stay until the next morning. Viall, in the meantime, consulted counsel, and saw the clerk of the court. On the morning of January 3d the prisoner was discharged by an entry on the jail-book, giving the cause, and thereupon left the office; but was presently after arrested by a deputy sher-

*GENERAL STATUTES OF RHODE ISLAND, c. 216.

Section 1. Any person who shall be imprisoned upon original writ, *mesne process*, execution, or surrender or commitment by bail in any action on penal statutes, or in any action of trover, detinue, trespass, trespass and ejectment, or trespass *quare clausum fregit*, in which the title to the close was not in dispute between the parties, or in any action of the case for words spoken, and who shall complain, on oath, to the keeper of the jail in which he is imprisoned, that he has no estate, real or personal, wherewith to support himself in jail or pay jail charges, shall be entitled to a citation as hereinafter provided.

Sec. 2. If such keeper shall believe such complaint to be true, he shall forthwith issue a citation, under his hand and seal, to the plaintiff at whose suit the complainant is imprisoned, if the plaintiff resides in this state; or, if he does not reside within this state, then to his agent or attorney of record; or, if he has no agent or attorney of record, then to the person who indorsed the plaintiff's writ as surety.

Sec. 3. Such citation shall set forth that such prisoner has made complaint as aforesaid, and that such prisoner will be discharged unless the sum of three dollars per week be, within 10 days from the time of the service of such citation, paid to the said keeper, in advance, for the

iff upon an *alias* execution procured on the same day by the defendant Potter, as attorney for Steere, and was recommitted to the custody of the jailor; and on the fifth of January Barnes caused another tort citation to be issued to Steere, in accordance with which the board was again paid; but in consequence, probably, of the form of citation, requiring payment in ten days, there was a lapse or hiatus of a week during which the board was not prepaid. After some weeks the plaintiff petitioned the supreme court for a writ of *habeas corpus*, but did not prosecute his petition, and filed a second petition March 24th, and on the twenty-seventh of March he was discharged by the court. The reason given in his petition for demanding a discharge was that his board had not been duly paid; but at the hearing the question was raised as to the legality of the arrest. The court gave no written opinion, but are understood to have said that he was certainly entitled to be released for the cause first assigned, and that, therefore, it was not necessary to pronounce upon the other. After his discharge he brought these three actions against the creditor, the attorney, and the jailor.

Several questions have been ably presented in the briefs of counsel: Whether the arrest and detention were illegal?

board of such prisoner, reckoning such board from the expiration of said 10 days after such service, which payments in advance shall continue to be made by such creditor during the time such prisoner shall be detained at his suit.

Sec. 4. Such keeper, upon issuing the citation, shall, at the expense of the state, cause service thereof to be made by the sheriff, his deputy, or any town sergeant or constable, on the person to whom such citation shall be directed as aforesaid, by reading the same to him in his presence, or by leaving a true and attested copy thereof at his last and usual place of abode.

Sec. 5. In case of default made in payment of such prisoner's board, as required in the third section of this chapter, the keeper shall discharge such prisoner from jail, stating, in his formal discharge on the jail-book, the reason therefor.

Sec. 6. The amount thus paid by the creditor for the board of the prisoner, so imprisoned at his suit, shall be added to and form a part of the costs of commitment and detention, and as such costs shall be paid by the prisoner in the then existing or any future proceedings which may be lawfully instituted against him for the recovery of the debt and costs of such suit.

whether trespass lies? whether the execution will protect all the defendants until it has been set aside by the court from which it issued? whether it will protect the jailor? whether the plaintiff has waived the irregularity by requiring the defendant Steere to support him in jail? The decisions in actions for false imprisonment, and the kindred but distinct action for malicious prosecution, are very numerous, and we have examined many of them.

The distinctions taken are very nice, and call for a careful examination. By the statute of Rhode Island, if a principal defendant shall be committed to jail by his bail after final judgment, he shall there remain for the space of 30 days; and if not taken in execution within that time, he shall be discharged from jail on payment of the prison fees. Gen. St. c. 213, §§ 4, 5.*

A law or practice requiring a defendant to be charged in execution within a limited time after judgment, if he has been imprisoned on *mesne process*, or after he is surrendered by his bail upon the judgment, is common to our jurisprudence and that of England. In England it depends upon rules of court, but in most of the United States upon a statute. When the judgment debtor has been thus discharged for this cause, it is held in England that the debt is not released; but the plaintiff cannot lawfully arrest the debtor again upon an execution issued upon the same judgment, nor can he evade that consequence by arresting him upon *mesne process* in an action on the judgment; but he may again imprison his debtor upon a second judgment. *Pullen v. White*, 3 Burr. 1448; *Russell v. Stewart*, 3 Burr. 1787; *Blandford v. Foote*, Cowp. 72; *Smyth v. Jefferys*, 6 T. R. 777; *Masters v. Edwards*, 1 Caines, (T. R.) 515.

*GENERAL STATUTES OF RHODE ISLAND, c. 213, § 5.

If the principal be not taken in execution within 30 days after final judgment against him when committed for want of bail, or when committed by his bail, or by the court to which his bail shall have surrendered him before such final judgment, or within 30 days after he shall have been committed by his bail, or by the court to which his bail shall have surrendered him, pending *scire facias* against his bail, such principal shall be discharged from jail upon payment of prison fees.

It was hardly denied in argument that the statute of Rhode Island requiring the discharge of the plaintiff was intended to operate at least to prevent another arrest upon the same judgment. It may be that it discharged the plaintiff's body in respect to that debt for all future time. See *Hidden v. Saunders*, 2 R. I. 391.

The statute does not provide any machinery for the discharge. It simply requires that the principal debtor shall be discharged. If the law were that the court should or might supersede the execution, then it might follow that the court could impose terms, such as that an action should not be brought, as is the law in England and New York; and that until the writ is superseded it is not too late to charge the debtor in execution, as was held in New York and South Carolina. *Brantingham's Case*, cited in *Reynolds v. Corp*, 3 Caines, 267; *Robertson v. Shannon*, 2 Strobb. 419. In the second of these cases is a very learned and interesting history and description of the English practice. From the language of the statute, "such principal shall be discharged from jail," and from the action of the jailor, which probably followed the usual practice, it would seem that the discharge is peremptory and purely ministerial, and we so consider it.

We are of opinion, therefore, that the plaintiff was duly discharged from jail, and was not liable to imprisonment again upon a fresh execution.

Does trespass lie for the new taking and detention—*First*, against the creditor and the attorney; *second*, against the jailor? As a mere question upon the form of action, our statute would require this point to be taken by demurrer. Rev. St. § 954. But behind the form lies the substantial question, whether it is necessary to prove malice, which is the gist of the action upon the case. The distinction is that for force directly applied the person using or commanding it is liable in trespass if the act was unjustifiable; but one who is only remotely instrumental in causing the injury is to be sued in case. If a warrant, writ, or order is procured from a judge or judicial officer having jurisdiction of the subject-matter and the parties, upon a true and fair statement of the

facts, then, if the writ or order is erroneous, it is the mistake of the court; and, since it is highly inexpedient that a judge should act at the peril of damages, there is no redress. This is so in some cases, even where the judge has not jurisdiction, if he decides that he has it. If, however, the facts are falsely and maliciously stated to the judge, the person guilty of the malice is liable in an action on the case. But if the act is throughout the act of the party, and there is no actual judicial finding, trespass will lie for the injury whether it was committed with or without malice. The only difference is in the damages. In this country, and especially in New England, the writ of execution is not granted by a judge, but issues as matter of course from the clerk's office; and there are many decisions that a justice or clerk who issues such a writ does it ministerially, and not judicially, and therefore is responsible in damages if one is issued contrary to law upon the facts within his knowledge. See *Briggs v. Wardwell*, 10 Mass. 356; *Fisher v. Deans*, 107 Mass. 118; *Andrews v. Marris*, 1 Q. B. 3; *Carratt v. Morley*, Id. 18; *Lewis v. Palmer*, 6 Wend. 367.

In this case there was nothing upon the records of the supreme court to instruct the clerk that the plaintiff had been imprisoned for more than thirty days, and therefore he was not wrong in issuing the execution in the form usual in such cases. The authorities are likewise many which hold that when a plaintiff, through his attorney, procures an execution or other writ which issues as of course, and which he has no right to have, both the plaintiff and the attorney are liable in trespass: the plaintiff, because the attorney acts for him in the due course of his employment; and the attorney, because in *tort* the command of a superior is no defence. *Deyo v. Van Valkenburg*, 5 Hill, 242; *Kerr v. Mount*, 28 N. Y. 659; *Bates v. Pilling*, 6 B. & C. 38; *Codrington v. Lloyd*, 8 A. & E. 449; *Green v. Elgie*, 5 Q. B. 114.

The leading case upon this subject is *Barker v. Braham*, 3 Wils. 368. There the attorney of a creditor caused execution to be issued against the person of an administratrix, when it should have been only against the goods of the intestate in her hands. Trespass was sustained against the attorney and

the client. The only difference which has been pointed out between that case and this is that the writ had been set aside before the action was brought. But here the plaintiff was discharged on *habeas corpus*, and though that was, probably, for a different cause, yet after he was set at liberty he had no occasion to apply for a modification of an execution which had become inoperative as to his person. Besides, this was not a case demanding action by the court. The reason for the rule that an order of court must be vacated before an action will lie, is that the judgment of a court cannot be collaterally impeached; but when a certain sort of writ has come to be issued as a matter of course, ministerially, the reason for the rule ceases. It was often said, formerly, that a writ or order after it had been set aside was a nullity from the beginning, and the party could not justify under it, because, when he appealed to the record, there was no such record remaining. But this notion is entirely exploded. The court will inquire why the writ or order was set aside, and if for error of the judge no action lies. *Williams v. Smith*, 14 C. B. (N. S.) 596; *Smith v. Sydney*, L. R. 5 Q. B. 203.

So, in the converse case, if the error was not that of the judge or court, but a mistake of the party, then an action lies immediately. This is a question of fact; and it was the fact in this case that the writ issued as of course. The point is a vital one, undoubtedly; and it may be that the plaintiff, having been driven to his petition for *habeas corpus*, might have been required by the supreme court to stipulate not to bring an action. We doubt whether the court has a discretion to that extent, but do not decide the point. If they could have made such an order they did not.

A single execution in Rhode Island contains all three of the old writs, just as in Massachusetts, 70 years since, *Parsons*, C. J., said: "By our statute we have but one form of execution, which includes a *capias ad satisfaciendum*, a *levari facias* as to the money of the debtor, and an *extendi facias* as to his lands." The statute requires that when the body is exempt the *capias* shall be struck out. Gen. St. c. 211, §§ 13, 15, 18. It was the duty of the attorney to see that

this was done. If the execution had been issued a few hours earlier, it would have been regular, and then the *arrest* after 30 days would have been bad; and we do not wish to be understood that the responsibility of the attorney and client would have been at all different in this state of facts.

The following cases will be found applicable to some or all of the points heretofore discussed. In many of them the writ was not set aside; in others it was; but, for reasons already given, this was unnecessary in the present case. Where a justice of the peace, having jurisdiction, had rendered a valid judgment, but had issued execution within 24 hours thereafter, his second act was ministerial and void, and he was liable in trespass. *Briggs v. Wardwell*, 10 Mass. 356. Execution similarly issued from a court of record is void, and a levy under it conveys no title. *Penniman v. Cole*, 8 Met. 496. Where judgment creditors had, through their attorney, taken out execution when an appeal was pending to the court from the clerk's taxation of costs, they were liable in trespass. *Winslow v. Hathaway*, 1 Pick. 211. Where an execution, afterwards set aside for irregularity, was levied on the plaintiff's goods, it was held that the cause of action arose at the time of the levy. *Read v. Markle*, 3 John. 523. Where a debtor was in prison on execution, an *extendi facias* taken out by the creditor was merely void, and might be collaterally impeached. *Kennedy v. Dunclee*, 1 Gray, 65. So where the debtor had been discharged from imprisonment with the creditor's consent. *King v. Goodwin*, 16 Mass. 63. Where a statute prohibited arrests before execution for a debt of £20 or less, but gave the judge power to authorize it under certain circumstances, trespass was maintained without setting aside the *capias*. *Brooks v. Hodgkinson*, 4 H. & N. 712.

It is commonly said that such writs are void, and, if the case turned upon that, we might probably hold that the execution, in as far as it was a *capias*, was void. But that expression is not a very happy one, because it was not void upon its face, and would undoubtedly protect the sheriff who acted under it. It is void, upon the weight of authority, as a defence to the party who wrongly procured it.

It will be proper to notice one or two classes of cases, somewhat analogous to this, in which trespass did not lie. A person may have a privilege from arrest for debt, and, if he is arrested, his only action will be case for a wanton or malicious arrest. The reason for this appears to be that a great variety of persons have this privilege under various circumstances. A writ which requires the arrest of such a person is valid, because neither the plaintiff nor the officer is bound to know the facts upon which the privilege depends; as, for instance, whether a trial is going on to which the defendant has been regularly summoned. In the leading case of *Cameron v. Lightfoot*, 2 W. Bl. 1190, the privilege of a witness is explained to be that of the court rather than his own, and that the court has a discretion to require him to give bail, notwithstanding the privilege. The precedent of that case has been followed in all those in which a privilege has been violated. In the present case the plaintiff had not a mere personal privilege. The creditor, having detained him as long as the statute permitted, had exhausted his right of imprisonment; he was, therefore, not disregarding a personal privilege, so much as assuming to himself a right which he did not possess. When the person of a defendant has been discharged, through the regular operation of an insolvent law, the courts of New York hold that the plaintiff who causes him to be arrested is liable in trespass.

In England this form of remedy was refused in a similar case,—in *Ewart v. Jones*, 14 M. & W. 774,—partly because the statute had given a remedy by summary application to the court, and partly because of the hardship of holding a creditor in trespass—that is, without proof of malice,—for an act which might be entirely innocent, as he might not have had notice of the proceedings in insolvency. Neither of these considerations applies to this case. In the ordinary case of one who has been discharged under a bankrupt law an additional reason may be given: that, until some recent statutes, the discharge itself might be collaterally impeached, and therefore a creditor wishing to contest the discharge had his

full right of action preserved to him, subject only to the usual penalty of costs if he failed to make his objection good.

The question whether the defendant Viall, the jailer, is liable to this action is the most difficult of all. An officer is protected by his precept. We consider the only exceptions to be when he himself had done some act under his warrant which renders the future arrest illegal, and when he knows with certainty that certain facts, though not done by him, have occurred since the warrant was issued which will have a like effect. Nothing which goes to prove that the writ ought not to have been issued shall affect him. In this case the jailer knew that the plaintiff was entitled to be discharged, and he discharged him accordingly; but in our opinion he was not bound to know that the *alias* execution was issued wrongly and improvidently. We can inquire, but he could not, whether the writ was taken out ministerially, as usual, or whether it was granted upon some special finding by the court; for it might happen that an execution should be so issued, though it is not usual. We hold, therefore, that the jailer was not bound to inquire into the mode in which a writ, regular upon its face, was obtained, and is justified in obeying it, although, as the facts now appear, he would also have been justified in disregarding it.

As to the damages. Here, again, the case much resembles *Barker v. Braham*, 3 Wils. 368, where the chief justice told the jury that there was no evidence of any conspiracy to oppress, but a mere mistake of the attorney, and that it was in some measure the plaintiff's own fault that she was detained in prison for eight months, for she might have obtained her release by application to the court or to a judge in chambers within a day or two after she was arrested. This case, also, is very much more favorable to the defendants, because the plaintiff here was liable to be arrested, and the only slip was in not obtaining the writ a few hours sooner; and he not only remained in prison, but he required the defendant Steere to support him there. This act of his is relied upon as a waiver of the illegality; but it is plain that all parties were acting

under a common mistake, and therefore, while a knowledge of law is imputed to every one, an act done in ignorance of the law should not have consequences which the actor could not in fact have intended. In this respect it differs from the act of causing the plaintiff's arrest, because that inflicted a positive injury which has no legal excuse. Requiring support in prison was not more a waiver, under the circumstances, than staying there was a waiver. It is a fact which goes very far in reduction of damages, but not to the whole action. There is no evidence that the defendant suffered more or otherwise, in any respect, than he would have done if the attorney had been a little more prompt. He has given us no evidence of any losses or expenses, or of any special damage. He was illegally arrested and detained through a mistake of law or miscalculation of time, which was shared by all the parties.

The plaintiff has brought these actions, as he had a right to do, and we hold that two of them are sustained by the facts. The injury was single, but the defendants Steere and Potter are jointly and severally liable, and the plaintiff can obtain from one or both of them a single satisfaction. *Murray v. Lovejoy*, 2 Cliff. 191; S. C. 3 Wall. 1; *Stone v. Dickinson*, 5 Allen, 29; S. C. 7 Allen, 26; *Gregory v. Cotterell*, 1 E. & B. 360; *Elliott v. Hayden*, 104 Mass. 180; *Savage v. Stevens*, 128 Mass. 254.

If the action or actions had been brought in the supreme court of Rhode Island, there might have been a set-off of judgments between the plaintiff and Steere. Whether this remedy is open here, we do not decide.

We assess damages against the defendants Steere and Potter severally at \$500, with costs.

We give judgment for the defendant Viall for his costs.

KNOWLES, D. J., concurred.

SCHULTZ v. MUTUAL LIFE INS. CO. OF NEW YORK.*

(Circuit Court, S. D. New York. March, 1881.)

1. LIFE INSURANCE—APPLICATION—STATEMENTS AND DECLARATIONS.

A life insurance policy provided that it was issued and accepted upon the express condition and agreement that "if any of the statements and declarations made in the application, * * * shall be found in any respect untrue," it should be void.

Held, that all statements and declarations in the application, whether material or not, must be true.

2. SAME—SAME—SAME.

Held, further, that such declarations include promises or agreements with regard to the future existence of facts, as well as those existing at the time.

3. SAME—PROMISSORY WARRANTY.

In the application the insured declared that he "will not practice any pernicious habit that obviously tends to shorten life."

Held, that this was a promissory warranty, whose breach would work a forfeiture, and evidence to prove such breach was admissible.

4. SAME—PERNICIOUS HABIT.

The excessive use of alcoholic liquors is a pernicious habit that obviously tends to shorten life.

The policy was upon the life of Johannes Schultz, for the benefit of his wife. The application, which was made a warranty and the basis of the insurance, contained the following provision: "And the said person whose life is proposed for insurance further declares that he is not now afflicted with any disease or disorder, and that he does not now, nor will he, practice any pernicious habit that obviously tends to shorten life." It was claimed by the defendant that the policy had become void through the violation of this provision. In support of this claim evidence of a former employer was introduced that insured became unable to satisfactorily perform his duties as book-keeper, and was consequently discharged, on account of his acquiring habits of excessive drinking. Testimony taken under a commission in Germany was also introduced, to show that after his return to that country, where he resided during the last five years of his life, the insured was grossly intemperate. According to the

*Insurance Law Journal.

testimony of a policeman thus taken: "His ordinary drink was *schnapps* or brandy. I never saw him drink anything else. In the last year of his life I saw him on different occasions drink on the street out of a bottle. I have often seen him drunk on the street. He staggered about and sometimes fell to the ground. In the morning it was his custom to go to Sommer's tavern, and afterwards he was accustomed to visit other taverns. He spent almost the whole day in visiting one tavern after another. * * During the last months of his life he was accustomed to carry a *schnapps* bottle about with him, from which he drank on his way from one tavern to another. * * I have more often seen him drunk than sober." One tavern keeper thus testified that he came to his tavern about three or four times a week, remaining from two to two and a half hours, and drinking three or four glasses of *schnapps*, and he had seen him drunk three or four times. Another tavern keeper testified to his drinking *schnapps* at times in his place. The proofs of death showed that insured had been afflicted for two years with chronic enlargement of the liver, and that death was caused by an apoplectic stroke of the brain, caused by congestion of the blood in the head and abdomen. Medical testimony was introduced to show that these disorders were the results of excessive drinking.

On the part of the plaintiff the evidence of two former acquaintances was submitted to the effect that the habits of insured in America, within their observation, were not different from those ordinarily prevailing among Germans, and his drinking was not excessive nor specially noticeable in its results. The evidence with regard to his habits in Germany was not contradicted. The court charged, among other things, that it was not necessary for defendant to show that the insured had acquired a habit which did obviously shorten his life or impair his health, but it must show that he "had acquired and did practice the habit of drinking alcoholic liquors to that degree of excess which is well known to be pernicious to health, and which tends to shorten life;" also, "I do not know that I can say, as I am requested to do, as matter

of law, that the excessive use of alcoholic liquors is a pernicious habit that obviously tends to shorten life. I regard that proposition as a matter of fact, and as a fact of such universal knowledge as to have become axiomatic." The jury brought in a verdict for the plaintiff. On a motion for new trial by defendant, *Shipman, J.*, said: "The motion for a new trial is granted upon the ground that the verdict was, in my opinion, plainly contrary to the evidence in the cause." The admission during the trial of the evidence taken under the commission was objected to by counsel for plaintiff, citing *Knecht v. Mutual Life Ins. Co.* 8 Ins. Law Journal, 639, and the following opinion was delivered by the court on this question.

John L. Hill and John J. Thomasson, for plaintiff.

Julien T. Davies and Roger Foster, for defendant.

SHIPMAN, D. J. The question pending at the adjournment yesterday was as to the admissibility of evidence to show that after the date of the policy the person whose life was insured, though previously temperate, formed the habit of intemperance. The clause in the policy referring to this subject is as follows: "This policy is issued and accepted by the assured upon the following express conditions and agreements: * * * If any of the statements and declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, this policy shall be null and void." The general character and legal effect of a similar clause in a life policy was considered by the supreme court in *Jeffreys v. Life Ins. Co.* 22 Wall. 47. The clause in that policy declared that the policy was made by the company upon the express condition and agreement that the statements and declarations made in the application for the policy, and on the faith of which it was issued, were in all respects true. The question before the court was whether the untruth of any statement or declaration made the policy void, or whether the untruth of such statements only as were material to the risk had such effect. The court says: "This stipulation is not expressed to be made as to important or material statements

only, or to those supposed to be material, but as to all statements. They need not be representations, even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states, and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company." The policy, then, having been issued upon the express condition that each statement and each declaration shall be found to be true, the only remaining question is whether this language includes declarations in regard to existing alleged facts, or includes also declarations in regard to the future existence of facts which are or are not to take place. I was at first inclined to the opinion that the adjective "untrue" was inapplicable to express the violation of a promise or agreement in regard to the future; that a declaration that a person would not do a thing could not be said to be untrue although the person did subsequently do the act which he had declared he would avoid. A consideration, however, of the stress which is laid by courts in analagous cases upon language in a policy which implies that a future act material to the risk is to be done or omitted, leads me to a different conclusion. In fire policies the application or survey is made generally a part of the policy. The answers to questions which indicate or declare that in future a certain state of things is to take place and exist in the insured property—as, for example, that after a certain time the property will not be used at night, or that a chimney will be built, or the location of a stove will be changed—have frequently been held to be binding upon the assured, and to be a promissory engagement or warranty that the named act would happen or continue to exist; so that in *Bilborough v. Ins. Co.* 5 Duer, 587, the principle is stated as follows: "Language in a policy which imports that it is intended to do or omit an act which materially affects a risk, its extent, or nature, is to be treated as involving an engage-

ment to do or omit such act." In this policy such statement and declaration is, in substance, incorporated into and made part of the policy. The language in regard to future pernicious habits is far more than a declaration of intention. It is a positive representation of a future fact, and is not to be regarded as an expression of the expectation or belief of the insured.

I am, therefore, led to the conclusion that the clause in the policy imports an agreement that future pernicious habits shall not be entered into, and that if the insured thereafter practices any pernicious habit that obviously tends to shorten life, the policy will be thereby avoided. The evidence is admitted.

PICKEL *v.* ISGRIGG and others.

(*Circuit Court, D. Indiana.* April 2, 1881.)

1. DEMURRER TO EVIDENCE—WHEN ALLOWABLE.

The evidence of a party, upon the affirmation side of an issue of fact before a jury, may be demurred to by the adverse party under certain conditions; but the party upon whom the burden of the issue rests is not permitted to demur to the evidence of the other party, for he cannot be allowed to assume that he has made out his case.

2. SAME—ADMISSIONS OF FACT.

If there is any evidence tending to prove a fact, that fact must be distinctly admitted in the demurrer to be absolutely true, so that the court will have nothing to do but apply the law to the established facts.

3. SAME—ADMISSIONS OF RECORD.

Unless the necessary admissions are distinctly made of record, no judgment can be pronounced on the demurrer, for the court is not substituted for the jury to weigh the evidence.

4. SAME—JOINDER IN DEMURRER.

It is also necessary that there should be a joinder in such demurrer.—[Ed.]

Baker, Hind & Hendricks and *George Carter*, for plaintiff.
Claybaugh & Higinbotham and *Herr & Alexander*, for defendants.

GRESHAM, D. J. The plaintiff, as indorsee of a negotiable promissory note, sued Jesse Isgrigg as maker and George B. Forgy as indorser. Failing to appear, judgment was entered against Forgy by default. Isgrigg answered: (1) Special *non est factum*; (2) that Forgy was the owner of the note and the real party in interest; (3) general *non est factum*. The defendant demanded a jury. A number of witnesses testified for the plaintiff, the note was read to the jury, and the plaintiff rested. Some of the witnesses testified that they saw the defendant sign the note after it had been read over to him in their presence and hearing. The defendant then testified in his own behalf, denying that he had ever signed the note, or authorized any one else to sign it for him. Other witnesses also testified for the defendant. The evidence of one or more of the defendant's witnesses tended to show that Forgy was still the owner of the note, and that he had indorsed it to the plaintiff, who is his sister, and a citizen of the state of Iowa, for the purpose of collecting it in this court.

After the defendant had concluded his evidence and rested, the plaintiff, by her counsel, announced that she demurred to the evidence. Time was given to prepare the demurrer, and the jury was discharged. This was done without objection by the defendant. The entire evidence on both sides, as reported by the stenographer, is set out in the demurrer which was afterwards filed. The demurrer concludes as follows: "And this being all the evidence given in the cause, the plaintiff says the evidence of the defendant Jesse Isgrigg, given in support of the issues tendered by him herein, is not sufficient for him to have and maintain his defence in this action, and therefore she demurs thereto, and prays that said Isgrigg be required to join in this demurrer; and the plaintiff admits the facts stated by the witnesses for the defendant herein before set out, and every inference and conclusion the jury may rightfully and reasonably draw therefrom."

Neither on the argument of the demurrer, nor at any previous time, was there any objection to the sufficiency of the demurrer or the regularity of any of the proceedings con-

nected therewith. It is insisted by counsel for the plaintiff that the form of the demurrer, and the action of the court thus far in connection with it, are in conformity with the practice in Indiana, as settled by the supreme court of the state, and that the jury could not have rendered a verdict for the defendant under any fair or reasonable construction of the evidence, and therefore the demurrer should be sustained, and judgment entered for the plaintiff. So far as known, this is the first time there has been a demurrer to evidence in this court. Isgrigg denied the execution of the note in his sworn answer, and that compelled the plaintiff to assume the burden of the issue.

The evidence of a party, upon the affirmation side of an issue of fact before a jury, may be demurred to by the adverse party under certain conditions. The party upon whom the burden of the issue rests is not permitted to demur to the evidence of the other party, for he cannot be allowed to assume that he has made out his case. If there is evidence tending to prove a fact, that fact must be distinctly admitted in the demurrer to be absolutely true, so that the court will have nothing to do but apply the law to the established facts. And this is the case, whether the evidence be direct and positive, or circumstantial and uncertain. If there be circumstantial evidence only slightly tending to prove a fact, the demurring party is required to admit that fact to be absolutely true before the opposite party will be required to join in the demurrer. Unless the necessary admissions are distinctly made of record, no judgment can be pronounced on the demurrer, for the court is not substituted for the jury to weigh the evidence. The relative functions of the court and jury are not to be lost sight of in determining the proper practice in a matter of this kind. The court admits to the jury all evidence which tends in any degree to prove or disprove the issue, and it is for the jury to say how far the evidence goes in proving or disproving the issue. In other words, it is the exclusive province of the jury to weigh the evidence which the court has admitted as relevant to the issue. The right of trial by jury is in effect destroyed by

holding, as some of the courts have held, that on a demurrer to the evidence the court takes the place of the jury and finds for the demurring party, unless, by a fair and reasonable construction of the evidence, the jury might have found for the adverse party.

I am aware that there are expressions in the opinion of the court in the case of the *U. S. Bank v. Smith*, 11 Wheat. 171, which do not sustain the views here announced. In delivering the opinion of the court in that case Mr. Justice Thompson says: "By a demurrer to the evidence the court in which the case is tried is substituted in the place of the jury; and the only question is whether the evidence is sufficient to maintain the issue. The judgment of the court on such evidence will stand in place of the verdict of the jury; * * * and everything which the jury could reasonably infer from the evidence demurred to is to be considered as admitted." But at a later day in the same term, in the case of *Fowle v. Common Council of Alexandria*, reported in the same volume, in delivering the opinion of the court, Mr. Justice Story says: "It is no part of such proceedings (demurrer to evidence) to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony or the presumption arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the court the law arising from the facts, It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts."

In the earlier case of *Young v. Black*, 7 Cranch, 565, the same learned judge says: "The party demurring is bound to admit as true not only all the facts proved by the evidence introduced by the party, but also all the facts which that evidence may legally conduce to prove."

In the case of *Chenoweth v. Lessees of Haskett*, 3 Pet. 92, Chief Justice Marshall says: "The defendants in the district court having withdrawn the case from the jury by a demurrer to the evidence, or by having submitted the case to the jury, subject to that demurrer, cannot hope for a judgment in

their favor, if by any fair construction of the evidence the verdict can be sustained." This was an action of ejectment, brought by the defendants in error to recover 50,000 acres of land, part of which was in the occupancy of the defendants in the court below. The defendants in that court disclaimed as to part of the land, and went to trial as to the residue. The original plaintiffs had the oldest title, and the case depended on the question whether their grant covered the land in dispute. According to the courses and distances given in the plaintiff's patent, a survey excluded the land in dispute. At the trial in the court below the plaintiffs read the deposition of one Wilson, who made the survey of the 50,000 acres. He testified that the line which formed the western boundary of the land intended to be granted was never run or marked. In his office he assumed a course and distance, and terminated the line in his mind at two small chestnut oaks in the wilderness, without indicating in his survey just where the two chestnut oaks might be found. No natural objects were given in the survey by which the course and distance might be controlled. Wilson had marked two small chestnut oaks as the corner of Robert Young's tract, and it was these two trees which he had in his mind, without indicating his intention on his survey.

The defendants demurred to the plaintiffs' testimony, and the jury found a verdict for the plaintiffs, subject to the judgment of the court on the demurrer. The court overruled the demurrer and gave judgment for the plaintiffs. This ruling was reversed on writ of error, the supreme court holding that the defendants in error were not entitled to the lands in possession of the plaintiffs in error, because neither the patent nor the face of the plat furnished any information by which the corner called for in the patent could be controlled. This decision was in effect that the testimony of Wilson was inadmissible to control the grant, and, that testimony out of the record, there was nothing to sustain the claim of the plaintiffs below to the land in dispute. There being no legal evidence in support of the affirmative of the issue in the court below as to the land in dispute, of course the demurrer should have

been sustained. This case, on its facts, is not in conflict with the ruling in *Fowle v. Common Council of Alexandria*, which is sustained both by reason and authority. Gould on Plead. c. 9, part 2; *Copeland v. New England Ins. Co.* 22 Pick. 135; *Gibson v. Hunter*, 2 H. Blackstone, 187.

The plaintiffs' counsel relied mainly on the decisions in the supreme court of this state. In *Straugh v. Gear*, 48 Ind. 100, the appellees, as indorsees of a promissory note, sued the makers. The answer admitted the execution of the note, but charged that the defendant's signature was procured to the same by fraudulent representations, of which the plaintiffs had notice. It seems that when the defendant concluded his testimony and rested, the plaintiffs demurred to the evidence, and the court sustained the demurrer. On appeal the case was affirmed on the ground that there was no evidence to show that the plaintiffs below bought the note with knowledge of the defence which the makers had against the payee.

The evidence of the defendant, upon whom the affirmation of the issue rested, was relative to a part only of that issue, and it is clear that in such a case a demurrer to the evidence may be safely risked, while it is fatal to a demurrer if there be evidence relevant to the whole issue. In deciding this case on appeal the court says: "When the plaintiff demurs to the evidence of the defendant, he should set out all the evidence offered by the plaintiff and defendant at full length, so that the court may determine upon the whole evidence for whom judgment shall be rendered." This announcement of the court, besides being objectionable as confounding the relative functions of court and jury, was hardly called for in the decision of the case.

Thomas v. Ruddle, 68 Ind. 326, was also a suit by the appellee, as indorsee, against the maker of a promissory note payable at a bank in this state. The answer was *non est factum*, and this was the only issue in the case. After all the evidence was in on both sides, the plaintiff, although he had the burden of the issue, demurred to the evidence, setting it all out in his demurrer, and it was sustained by the court. On appeal it was held that much of the evidence which tended

to show that the defendant's signature to the note had been procured by fraud was irrelevant, under the issue of *non est factum*, and the case was affirmed on the ground that the defendant below was guilty of negligence in signing the note, and that the plaintiff below acquired the note after it became due, but from prior indorsees, who, for anything that appeared, to the contrary, were *bona fide* holders. "But," say the court, "when either party demurs to the evidence his demurrer must be ruled upon according to the practice in this state, in view of all the evidence which has been given in the cause at the time the demurrer was filed."

Other Indiana cases were cited in support of the demurrer, but they need not be reviewed, as I think the law is correctly stated in *Fowle v. Common Council of Alexandria*.

In the case in hand, the plaintiff had no right to assume that she had sustained the affirmation of the issue and demurrer to the defendant's evidence.

There was no joinder in the demurrer, which was necessary, and the proper admissions were not made in the demurrer, or upon the record, upon which the court could found a judgment. A new trial is the only solution of the embarrassment.

UNITED STATES v. DAVIS.

District Court, D. Massachusetts. — 1881.)

1. INDICTMENT—REV. ST. § 5523.

An indictment under section 5523 of the Revised Statutes, for a refusal to answer a lawful inquiry of the supervisor of elections, in the verification of a registration list, must aver that such inquiries were made of the defendant at the place assigned by him in such list as his place of residence.

2. SAME—AMENDMENT—REV. ST. § 1025.

Such omission is matter of substance, and cannot be aided by amendment under section 1025 of the Revised Statutes.—[Ed

E. W. Burdett, for the United States.

A. Lawrence, Jr., for defendant.

NELSON, D. J. The defendant has been convicted under Rev. St. § 5523, and now moves in arrest of judgment for alleged defects in the indictment. Section 5523 is as follows: "Every person who, during the progress of any verification of any list of the persons who may have registered or voted which is had or made under any of the provisions of title 'The Elective Franchise,' refuses to answer or refrains from answering, or, answering, knowingly gives false information in respect to any inquiry lawfully made, shall be punishable by imprisonment for not more than 30 days, or by a fine of not more than \$100, or by both, and shall pay the costs of the prosecution."

The provisions of the elective franchise title referred to in this section are contained in sections 2016, 2021, and 2026. Section 2026 provides that the chief supervisor of elections "shall require of the supervisors of elections, when necessary, lists of the persons who may register and vote, or either, in their respective election districts or voting precincts, and cause the names of those upon any such list whose right to register or vote is honestly doubted, to be verified by proper inquiry and examination at the respective places by them assigned as their residences." Section 2016 makes it the duty of supervisors of elections "to make, when required, the lists, or either of them, provided for in section 2026, and verify the same;" and section 2021 provides for the appointment of special deputy marshals, "whose duty it shall be, when required thereto, to aid and assist the supervisors of elections in the verification of any list of persons who may have registered or voted."

These several provisions were originally parts of the act of February 28, 1871, and though separated in the revision of the statutes, they should evidently be construed together to ascertain their true meaning and effect. Taken together their meaning is very plain. They provide for a verification, by the supervisors of elections, under the direction of the chief supervisor, of the lists of persons who may register and vote in the several election districts or voting precincts, and direct the manner in which the verification shall be conducted. It is to be made by the supervisors by inquiry and examination

at the places assigned in the registration or voting lists by the persons whose names are registered thereon as their places of residence. It is made the duty of all persons found by the supervisors at such places of residence, in the progress of their verification, in response to proper inquiries, to give to the supervisors all the information in their possession in regard to the persons registered as residing there, bearing upon their eligibility as voters. Neglect or refusal to answer such inquiries, or the giving of false information, is made a misdemeanor, punishable by fine and imprisonment. The inquiries can be lawfully made only at the places assigned as residences, and no person is bound, under the penalties of section 5523, to answer the inquiries or give the information elsewhere. The indictment should correspond with the statute, and should set forth the offence according to its terms.

The evidence at the trial showed that the inquiry of the supervisor to the defendant, which he refused to answer, was made at the place assigned by him in the registration list as his place of residence. But the indictment fails to aver this with sufficient certainty, according to the rules of criminal pleading. The allegation is that the supervisor made an inquiry, which was a lawful inquiry, of the defendant, which the defendant unlawfully refused to answer. But it designates no place where the inquiry was made, except that it was made in the city of Boston. The indictment, therefore, describes no offence punishable by the laws of the United States.

The omission is matter of substance and not of form only, and the indictment is not aided by section 1025, which provides that no indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Judgment arrested.

In re Mott, Bankrupt.

(District Court, S. D. New York. January 17, 1881.)

1. ASSIGNEE'S SALE—BONA FIDE PURCHASER—ORDER OF SALE.

A. and B. were adjudicated bankrupts under the bankrupt law of 1841. A.'s undivided interest in the lands in controversy was sold to C. under an order of court dated June 13, 1868, directing the assignee "to sell the assets hereinafter referred to in each of said matters at public auction, and for cash, by advertising the same one time, 14 days prior to the day of sale, in the newspaper called the *Times*, published in the city of New York," being "all the right, title, interest, etc., of each and either of said bankrupts in and to any and all real estate in any manner described in a certain will of John Hopper," etc. A. died in 1874, leaving a will devising the land. *Held*, upon petition of his devisees to have the sale to C. set aside and annulled:

(1) That C. and his grantees were entitled to avail themselves of all the benefits that may be claimed by a *bona fide* purchaser upon a judicial sale, no bad faith on C.'s part being averred by the petitioners, and it appearing that he actually paid the price bid, which was not alleged to have been inadequate.

(2) That the order of sale was not invalid merely because it did not fix the day and hour at which the sale should take place. The order was a sufficient compliance with section 9 of the bankrupt act.

(3) That the sale was not invalid merely because made at a time to which it was adjourned by the assignee. This was not an appointment of the time of sale by the assignee contrary to section 9 of the act.

(4) That a proper construction of the order of sale was that the assignee might put up both A.'s and B.'s interests for sale together, and therefore the sale was not invalid because so made.

(5) That the order was none the less an order of court because signed by the judge. There is practically no distinction in a court of bankruptcy between an order of the judge and an order of the court, and whenever the judge acts, his act is the act of the court.

(6) That, as the sale was once regularly advertised, the adjournment did not make a new 14 days' advertisement necessary.

(7) That rules 62 and 70 of the rules of court, specifying certain newspapers in which notice of sale must be published, have no application to sales made under the special order of the court.

In re King, 3 FED. REP. 839, distinguished.

Wm. Fullerton and Geo. F. Betts, for petitioners.

Douglas Campbell and E. W. Paige, for respondent.

CHOATE, D. J. This is a petition to set aside and annul a sale of the interest of the assignee in bankruptcy of Jordan

Mott in certain real estate made by the assignee at public auction on the eleventh day of September, 1868. A grantee of a grantee of the purchaser at the sale, having been served with notice, has appeared, and now moves that the petition be dismissed on the ground that it states no case for setting aside the sale. This motion is in the nature of a demurrer to the petition. The motion was heard, however, upon the petition and upon all the proceedings of record in the case.

Jordan Mott was adjudicated a bankrupt under the bankrupt law of 1841. He died, as appears by the petition, in 1874, leaving a will under which the petitioners claim as his devisees. In his life-time, and subsequent to his bankruptcy, he is alleged to have entered into possession and to have been seized in fee of certain lands—part of the lands included in the sale sought to be set aside—which were set off to him in partition; and the petitioners, as his devisees, claim to have succeeded to his title. This is the interest by virtue of which they claim to set aside the sale, their rights and interest as devisees of Jordan Mott being adversely affected by the title made under his assignee in bankruptcy. It is not suggested, at this stage of the case, that the petitioners have not such an interest as authorizes them to maintain the petition if it states a case for setting aside the sale.

The order of the court under which the assignee acted in making this sale was entitled *In the Matter of Jordan Mott, Bankrupt*, and also *In the Matter of Jacob H. Mott, Bankrupt*, both of which proceedings were pending in this court under the bankrupt law of 1841. The order, which was dated thirteenth of June, 1868, directs the official assignee "to sell the assets hereinafter referred to in each of said matters at public auction, and for cash, by advertising the same one time, 14 days prior to the day of sale, in the newspaper called the *Times*, published in the city of New York, describing the same as follows: "All the right, title, interest, etc., of each and either of said bankrupts in and to any and all real estate in any manner described in a certain will of John Hopper, etc., which is more particularly described as follows:" Then fol-

lows a particular description of several parcels of land in the city of New York.

It appears by the petition that the interest of the assignee in both matters was put up and sold together, and that one James M. Smith, Jr., became the purchaser at the auction sale for the sum of \$1,750, which he paid to the assignee, whereupon the assignee delivered to him separate deeds as assignee of Jordan Mott, and as assignee of Jacob H. Mott, which deeds of his interest as assignee of Jordan Mott express, as the consideration thereof for the several parcels of land, the sums of \$725, \$50, and \$50, respectively.

It is not alleged in the petition that Smith was guilty of any fraud or deceit, or that he was not a *bona fide* purchaser, for value, of such interest as was conveyed to him by the assignee; and, although improper motives in respect to the disposition of the proceeds are charged against the assignee, it is not alleged that Smith, the purchaser, was privy to them in any way. Nor is it alleged that the price bid and paid by Smith was less than the interest of the assignee was then worth, or that any other parties were willing, or could have been found, to give any greater sum. It does appear by the petition, on the contrary, and is expressly alleged, that Jordan Mott actually owned the real estate in fee at the time of his death, and was in possession thereof, from which it must be inferred that the interest of the assignee, whatever it may have been, was a mere colorable interest; that that which was sold and bought was merely a right to bring a lawsuit to recover the lands under a title adverse to that under which Jordan Mott held and claimed them. This necessarily disposes of the claim on the part of the petitioners that this sale should be set aside as improvidently made and as injuriously affecting the interests of the bankrupt's estate. Unless there was an inadequacy of price, no such relief could be given on that ground, even if, after this great lapse of time, the petition on that ground would be entertained. I think, also, upon this petition, the purchaser, Smith, and his grantees, are entitled to avail themselves of all the benefits that may be claimed by a *bona fide* purchaser upon a judicial sale, no bad

faith or collusion on his part being averred by the parties seeking to set aside the sale, and the fact appearing that he actually paid the price bid, which is not alleged to have been inadequate. The allegation that Jordan Mott's interest in the lands was worth \$500,000 is not and cannot, consistently with other averments of the petition, be construed as an allegation that the interest of the assignee was of greater value than the price paid.

It is claimed, however, that on the facts alleged in the petition the order of the court under which the sale was made was void on several grounds, and also that the sale was not made in conformity with the order, if that was valid.

The first objection to the order is that the court in the order of sale did not appoint the time of sale. The ninth section of the bankrupt act provided that all sales should be "at such times and in such manner as should be ordered and appointed by the court in bankruptcy." It is argued that congress intended that the court should fix the day and hour at which the sale should take place. Such has not been the practical construction put upon the statute by the court, and in the many orders of sale made under that law none are referred to in which the day and hour of the sale were fixed by the court. The making of an order directing the assignee to sell, is ordering the time of sale within the meaning of the statute. The order amounts to a direction that the sale should be made at once, with reasonable diligence, and this is a practical and sufficient compliance with the statute. The further objection—that the assignee, by adjourning the sale from the time first fixed, appointed the time of the sale, instead of the court, as required by the statute—is answered by the same suggestions. It is suggested, indeed, in the argument, that there is no sufficient evidence that the sale was regularly adjourned to the eleventh of September, when it was actually made. It does, however, appear that such an adjournment was advertised in the newspaper as having been made by the assignee. This, together with the general presumption that a public officer does his duty, is, I think, suf-

ficient, especially as against a petition which does not aver that the sale was not adjourned.

It is also objected that the sale was void because the assignee sold the interests of both estates together, whereas the order required him to sell each separately. I think a proper construction of the order is that the assignee might put up both interests for sale together. The order was in both matters. The interest to be sold, as set forth in the description to be inserted in the advertisement, was the right, title, and interest of "each and either" of said estates. If, possibly, the sale of both interests together was liable to cause embarrassment in apportioning the proceeds between the two estates, that is a matter in which these petitioners have no interest, and it would be rather late to give any weight to that consideration now. I see no such serious embarrassment in such a sale as to make it necessary to hold it void on account of any impossibility of apportionment, and I think the assignee did not violate the terms of the order in selling in this way. Whatever interests Jordan Mott and Jacob H. Mott had at the time of their bankruptcy in the lands under the will of John Hopper, if any, which passed to their assignee, the interest was an undivided interest of very uncertain nature. There was no impropriety in ordering them to be sold, and in selling them together, and this mode of selling was more likely, as it seems to me, to attract purchasers.

It is also objected to the order that it was the order of the judge, and signed by him, and not an order of the court, entered in its minutes; but this suggestion is not sustained by the record, which shows that the order was entered at length on the minutes of the court. Its being signed by the judge does not make it any the less an order of the court. Nor is there practically any distinction in this court, as a court of bankruptcy, between an order of the judge and an order of the court, because, under the statute, the court in bankruptcy is always open, and whenever the judge acts, wherever he may be, the act is the act of the court.

It is also objected that the sale was not advertised for 14 days, nor at all, the 14 days' advertisement being for the
v.6,no.7—44

fourth of August, and the sale by adjournment being on the eleventh of September, for which time no advertisement was made. But if a sale, once duly advertised, can be adjourned at all, and held on the adjourned day without a new 14 days' notice, the proceeding was regular. And I think the power to adjourn a sale once regularly advertised, in like cases, is well established by constant practice and as matter of authority. *Richards v. Holms*, 18 How. 147.

Finally, it is objected that the order and the sale are void because the advertisement was ordered to be inserted and was inserted in the *Times*, and not in certain other newspapers alleged to be designated in the rules of this court then in force. The act provided that it "shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations and forms of proceedings in all matters of bankruptcy, which rules, regulations, and forms shall be subject to be altered, added to, revised, or annulled by the circuit court of the same district, and other rules, regulations, and forms substituted therefor." Under this authority this court adopted certain rules, which were submitted to the circuit court, and the circuit court took no action thereon. Among them were the following:

"62. Six days' previous notice by published advertisement shall be given of the sale of personal effects, and 14 days' of real estate, to be published where notice to show cause on the petition for the decree of bankruptcy was published, and the assignee may also, at his discretion, cause notice to be otherwise published, so as best to benefit the sale."

"70. All notices of proceedings in bankruptcy required to be published in newspapers shall be inserted in at least three of the following newspapers published daily in the city of New York, (of which the *Courier and Enquirer*, having the largest circulation, shall be one:) The *Morning Courier and New York Enquirer*, the *Journal of Commerce*, the *New York Daily Express*, the *New York Standard*, the *New York Commercial Advertiser*, the *Evening Post*, and the *New York American*; the party petitioning having the right, if he chooses to do so, to designate to the clerk the other two papers, an evening

paper being one; but on his omission to do so the clerk will allot the publications to the said papers as equally as conveniently may be; and when the bankrupt resides out of the city and county of New York the court will designate some paper published (if any there be) in the county where he resides."

The petition alleges that notice of the original petition of bankruptcy in this case, which by the act was required to be published in newspapers, was published in the *Morning Courier and New York Enquirer*, the *New York American*, and the *New York Daily Express*; and the illegality alleged in this order of sale is that it did not, in conformity with rule 62, direct advertisement to be made in those three newspapers in which the notice of the original petition was thus published.

An examination of all the orders of sale, in cases in bankruptcy under that act, from 1845 to the present time, directing sales by auction to be made by the assignee, shows that not one is to be found in which the court designated the newspapers required by rule 62, if that rule applied. In many of them a different designation was made. This, it seems to me, is conclusive that rule 62 was not construed as applying to sales made under the special order of the court. A settled construction of a rule by the court which made it, is just as much a part of the rule as its text. The third section of the act vested the estate of the bankrupt in the assignee. It provided that "the assignee shall be vested with all the rights, titles, powers, and authorities to *sell*, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully to all intents and purposes as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy." The ninth section provided, as above cited, that "all sales, transfers, and other conveyances of the assignee of the bankrupt's property, etc., shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy." These provisions of the statute make the rules, and the practical construction given to them, intelligible. As all sales must be made under

the order and direction of the court, a general rule (62) was made, under which the assignee might act, without applying to the court in the particular case to designate the newspapers in which he should advertise; but this general rule was not designed to restrict the court from making a special order as to the manner of sale, which the court was, by the ninth section, expressly authorized to do. This is made entirely clear by rule 61, which must be read in connection with rule 62, and which provided that "the sale of the bankrupt's estate shall be at public auction, and for cash, unless, on the report of the assignee, or with his assent, it is otherwise specially ordered by the court."

Rule 62, which immediately follows, was designed to carry this into effect, and relates only to auction sales without special order, the court thus directing, under section 9 of the act, that the assignee might in all cases sell at once or at any time at public auction, upon giving the notice prescribed in that rule. As to rule 70, it has no direct application to sales under special orders of the court, for they are not "proceedings in bankruptcy required to be published in newspapers," either by the statute itself or by any other rule. There is, therefore, no force in this objection, and the order being in conformity with the ninth section of the act, and not in violation of any rule of the court, was entirely regular in this respect. It is not intended, by putting the decision on the ground that the order of sale and the sale were not in the particulars complained of irregular, to intimate, or to give any support to the claim of the petitioners, that a judicial sale to a *bona fide* purchaser, consummated by a conveyance and the payment of the consideration, can be avoided because of such error of the court, if there had been errors, the court or the assignee having jurisdiction to order the sale. The general rule undoubtedly is, as to *bona fide* purchasers at judicial sales, that the only questions open are power in the court and good faith in the purchaser. *Voorhees v. U. S. Bank*, 10 Peters, 477, and cases cited. But what would be the effect of these alleged irregularities, if they had been such, it is not necessary to inquire.

The case of *In re King*, 3 FED. REP. 839, cited and relied on by the petitioners, was a case of fraud and deceit on the part of the purchaser. It disclosed a purpose to defeat a former and regular judicial sale of the interest of the assignee by a title made under what purported to be a second sale, procured by deceitful practices. The case is no precedent for setting aside this sale, which, so far as the petition shows, was in perfect good faith, so far as the purchaser is concerned, and not subject to the objection taken in the case referred to, that it was without any consideration, or was in derogation of a former regular judicial sale.

The former order of the court in the present case, setting aside an earlier sale upon an early application of a creditor, on the ground that the assignee had withheld from the court information in his possession affecting the value of the property, which, if communicated, might have induced the court to make a different order as to the mode of sale, is also, as a precedent, inapplicable to this case. In fact, the court having the whole of that former proceeding before it adopted the mode of sale directed by this order as most likely to effect a satisfactory sale of the interest vested in the assignee. I see no ground for the suggestion of inadvertence or improvidence, as applied to this order, nor is such a suggestion of any force as against a *bona fide* purchaser.

On these grounds the motion to dismiss the petition must be granted.

VETTERLEIN v. BARNES, Assignee, etc.

(Circuit Court, S. D. New York. December 18, 1880.)

1. RIGHT OF SOLVENT PARTNER TO ADMINISTER ASSETS OF THE FIRM.

The sole remaining solvent partner has the right to demand and take from his insolvent copartner the liquidation of the affairs of the firm.

2. SAME—WAIVER OF.

This right to administer is a personal privilege, and if the solvent partner permit his insolvent partner, or the representative of his in-

solvent partner, to go on and administer the assets, he thereby waives his privilege.

3. SAME—LACHES—STATUTE OF LIMITATIONS—USE OF ASSETS OF OLD FIRM.

A firm holding assets of prior firms, in which the plaintiff was a partner, as liquidators, became bankrupt. The plaintiff, with full knowledge of the bankruptcy and of the adverse claim of the assignee to the assets, demanded, after about two years, an accounting and settlement of his interest in the old firms. *Held*, upon this suit, brought 10 years after the bankruptcy, claiming for the first time his right to administer the assets as sole solvent partner:

(1) That independently of the statute of limitations he had lost the right to administer by laches.

(2) That his claim upon any part of the collections made by the assignee from the assets of the firm was barred by Rev. St. § 5057.

(3) That the new firm having, with the plaintiff's consent, taken and used all the assets of the prior firms as their capital in business, the property was subject to the debts of the new firm.

Charles F. Blake, for plaintiff.

Henry F. Wing, for defendant.

Saml. B. Clark, Asst. U. S. Dist. Att'y, for the United States, a preferred creditor.

CHOATE, D. J. In February, 1871, Theodore H. Vetterlein and Bernard T. Vetterlein were adjudicated bankrupts in this court, and in April, 1871, the defendant, Demas Barnes, was duly appointed their assignee in bankruptcy and qualified as such. The bankrupts traded under the firm name of Th. H. Vetterlein & Sons, in New York, and under the firm name of Vetterlein & Co. in Philadelphia. The original bill in this case was filed in November, 1879. Both plaintiff and defendant are citizens of the state of New York. The bill alleges that the plaintiff was a partner in two other firms preceding the firm of Th. H. Vetterlein & Sons of New York. The first of these was a firm alleged to consist of Theodore H. Vetterlein, one of the bankrupts, B. Vetterlein, Henry Thurman, and the plaintiff, doing business under the firm name of Th. H. & B. Vetterlein & Co., which was dissolved April 30, 1865, in which the plaintiff's interest is claimed to have been, though not so alleged in the bill, from about the year 1862 to April 30, 1864, one-sixth part of Theodore H. Vetterlein's share of the profits, which was $37\frac{1}{2}$ per cent., and from April

30, 1864, to April 30, 1865, one-eighth of the whole profits of the firm. The second of these prior New York firms was one consisting of the two bankrupts and the plaintiff, under the firm name of Th. H. Vetterlein & Sons, which was formed on the dissolution of the earlier firm of Th. H. & B. Vetterlein & Co., and continued to do business until some time in the year 1867, when it was dissolved by the withdrawal of the plaintiff, and thereafter the bankrupt firm was formed and continued the business till the bankruptcy. The plaintiff also claims upon the proofs, though not precisely so stated in the bill, that he was a partner in two prior firms of Vetterlein & Co. of Philadelphia,—of the first from sometime in January, 1862, to July 6, 1869, when the firm was dissolved by the withdrawal of one of the partners, Charles A. Meniar, the firm consisting of Theodore H. Vetterlein, Charles A. Meniar, and the plaintiff; that upon its dissolution a new firm of the same name was formed, composed of Theodore H. Vetterlein and the plaintiff, which continued the same business till December 31, 1869, when it was dissolved, and a new firm of the same name, composed of the two bankrupts, continued the same business till its dissolution by bankruptcy. The plaintiff's interest in the first of these firms of Vetterlein & Co. is claimed to have been, until January 1, 1866, one-sixth of Theodore H. Vetterlein's share of the profits, which was four-fifths, and after that time 15 per cent. of the entire profits; and his interest in the business of the second firm of Vetterlein & Co. also 15 per cent. of the entire profits.

The bill further alleges that each succeeding firm received the remaining assets of the prior firm as liquidators; that all of each prior firms were solvent upon their dissolution; that there was, as to each of them, something still due to the plaintiff for his share of the profits; that funds or other specific property which constituted part of the assets of each of said prior firms came to the hands of the bankrupts, and that such assets were not entirely liquidated at the time of the bankruptcy; that the bankrupts held the same as liquidators only, and that some part of said assets came to the hands of

the defendant, their assignee in bankruptcy; that the defendant, under color of his title as assignee in bankruptcy, upon his appointment in April, 1871, took into his possession all the funds so held by the bankrupts, as liquidators, to administer the same as such assignee; that he has sold some of said assets, and now holds the proceeds thereof; that the defendant has in his possession over \$40,000 of such funds so wrongfully collected and appropriated.

The defendant's answer, besides containing a denial of nearly all the averments of the bill, sets up as a defence the two-years' limitation contained in Rev. St. § 5057.

The proofs show that the plaintiff was a partner in the first firm of Vetterlein & Co. from January 1, 1866, till its dissolution July 6, 1869, and also in the second firm of Vetterlein & Co. till its dissolution December 31, 1869, and in the first firm of Th. H. Vetterlein & Sons from its formation May 1, 1865, to its dissolution December 31, 1867, his interest in those firms being the share of the profits of the business stated in the bill. The proof is not sufficient, in my judgment, to show that he was a partner in the firm of Th. H. & B. Vetterlein & Co. The proofs, on the contrary, show very clearly, I think, that he was not a member of that firm, but that, by an agreement between him and his father, Theodore H. Vetterlein, his father promised to give him one-sixth part of his, Theodore H. Vetterlein's, share of the profits from sometime in 1862 down to April 30, 1865. Not only is there no entry whatever in the books of the firm of H. & B. Vetterlein & Co. showing that the plaintiff had any interest therein as a partner, but it appears that the next succeeding firm, Theodore H. Vetterlein & Sons, No. 1, of which the plaintiff was a partner, became the liquidators of the former firm, and received and distributed, in money and other property, a large part of the assets of the late firm of Th. H. & B. Vetterlein & Co. among the partners, exclusive of the plaintiff, and had accounts with that firm and some of its members, which are entirely inconsistent with any right or claim of the plaintiff to be considered a partner in that house. Nor is the proof sufficient to show that the plaintiff was a member of Vetter-

lein & Co. of Philadelphia prior to January 1, 1866, although by a private agreement with his father he was entitled to receive from him a part of his, the father's, share of the profits prior to that time, and on the first of January, 1866, this share, in accrued profits, was transferred to his account and put into the business by him. The proof is not sufficient to establish the alleged agreement, upon the dissolution of Vetterlein & Co., that the plaintiff should receive all the collections from the assets of that firm which had been charged off to profit and loss until his claim against the firm was paid in full. If any agreement on the subject was made it appeared that it was in writing, and it was not produced, nor was its non-production sufficiently accounted for to admit parol evidence of its contents. The plaintiff failed to prove that there was any balance of profits due to him and still unpaid from any of said prior firms. It is proved that some of what once constituted part of the assets of some or all of the prior firms of which the plaintiff was a member were received by the defendant as assignee of the bankrupts, and have ever since his appointment been held by him as such assignee under the claim that they belonged to the estate of the bankrupts. The books of the prior firms that came into his possession with the assets and books of the bankrupts apparently showed that there was nothing due to the plaintiff, but that, on the contrary, he was indebted to said firms.

On the twenty-seventh of May, 1873, the plaintiff caused the following letter to be sent to the defendant by his agent: "I am instructed by Mr. Theodore J. Vetterlein to require of you an accounting and settlement of his interest in the firms of Vetterlein & Co. and Th. H. Vetterlein & Sons, as existing prior to his withdrawal, the assets of which firms came into your hands as assignee in bankruptcy. In default of your so doing, I am directed to institute legal proceedings to procure the same." On the second day of June, 1873, the plaintiff sent the defendant a letter by his agent, as follows: "Please oblige be by an acknowledgment of my communication of the twenty-seventh ultimo. If you will state to me in your answer the substance of what you asked of me person-

ally some days back, and send to me an order on James K. Hill, Esq., to permit me to examine the books now in his charge, I shall have no hesitation in furnishing you with such further *data* as you may require." On the third day of June, 1873, he wrote to the defendant, through his agent, as follows: "In reply to your note of this date, in which you say that 'in regard to any claim which you may represent against the Vetterlein estate in bankruptcy it seems to me that the proper course for you to pursue is to present it in the usual way to J. K. Hill,' I have to answer that I do not represent any claim against the estate of the Vetterleins in bankruptcy. The communication which I addressed to you on the twenty-seventh ultimo is explicit, and unless I have the answer asked for I shall be compelled to proceed as therein set forth." On the twentieth day of February, 1874, he wrote again to defendant, by his agent, as follows: "I beg to acknowledge the receipt of your favor of the eighteenth instant, in which you say you prefer to allow all disputed points at issue in the Vetterlein estate to remain in abeyance until the government case is disposed of, etc., and that you hope to hear very soon of some *definite* result in the United States case, and as you are enjoined from making any payment at present, no loss can accrue to me or to my client by reason of some little further delay. The fact of the pendency of the United States case, and that you are enjoined from making any payments, does not, it seems to me, prevent you from fully considering now the matter in question. That is all that is asked at present. If you bear in mind that my client has already waited over two years, you must admit it is not unreasonable that they are not satisfied to await the issue of a case in which they have not the least interest. To repeat, all that is asked now is a just and equitable consideration and some definite action."

Notwithstanding the demand for an account and definite action contained in these letters, and the refusal to postpone the matter as proposed by the defendant, the plaintiff took no other steps to enforce his alleged rights till about the first day of June, 1878, when, by his same agent, he wrote the defend-

ant as follows: "After an interview with Mr. Wing, I have concluded, as the representative of Mr. Theodore J. Vetterlein, to send you the annexed statement and accounts. I claim that, notwithstanding his protest, you have collected moneys and property belonging to Theodore J. Vetterlein amounting to \$40,135.99. I am authorized and do now make demand for the payment of this sum. I may state that these statements and accounts only partially represent the claim of Theodore J. Vetterlein, and I shall serve you with additional accounts as soon as I can ascertain the details. I am ready and willing to give you any explanation you may desire, or to furnish you with all the requisite proofs. Please give me an acknowledgment of the receipt, and oblige," etc. The account inclosed was as follows:

"Demas Barnes, Esq., to T. J. Vetterlein, Dr.

1870.

December 21—	To amount as per statement hereto annexed,	\$19,187 91
"	To cash balance on books of Vetterlein & Co.,	31 67
"	To cash account, services rendered Th. H. Vetterlein & Sons in 1868 and 1869, as per agreement, in the purchase of tobacco, -	5,000 00
"	To collection of amounts charged to me by profit and loss, as per Journal 10, pp. 119-120, - - - - -	15,916 31

I claim interest on the above items, 1, 2, and 3, from December 21, 1870, and on item 4 from the date of the collection of the several matters herein contained.

\$40,135 99 "

The statement referred to in the first item of this account consists of two successive accounts, the first being an account headed "Theodore J. Vetterlein in account with Th. H. & B. Vetterlein & Co.," in which the plaintiff is credited with \$17,701.87, being one-sixth of \$106,211.27, claimed to be the profits of Theodore H. Vetterlein up to April 30, 1864, and also with \$6,062.78, one-eighth of the alleged profits of the firm from May 1, 1864, to April 30, 1865, and he is charged with \$838.03, the amount standing to plaintiff's debit on the books of the firm. The balance of this first account, \$22,926.62, to the credit of the plaintiff, is carried forward into the second account, which is entitled "Theo. J. Vetterlein in

account with Th. H. Vetterlein & Sons." In this second account, which runs from October 23, 1865, to December 21, 1870, the plaintiff is charged with various payments in cash down to the twenty-eighth of November, 1870. He is credited with the above-mentioned balance of the account with the former firm; also with \$2,622, his share of the profits up to December 30, 1865, which sum is credited to him on the books of the firm, also with the sums of \$20 and \$50 cash paid at different times to the firm, with which the books also credit him. This second account is made up with semi-annual rests, and the plaintiff is credited with interest amounting in all to \$8,629.87. He is charged with one item which appears to be a payment by the firm on an individual adventure of his own, \$4,904.51; also with \$1,479.55, a transfer in Vetterlein & Co.'s ledger. It appears by that ledger that a debit balance to this amount against the plaintiff was balanced by charging the same to Th. H. Vetterlein & Sons, but no corresponding entry was made in the books of the latter firm. The credit balance of this second account is \$19,187.91, and this constitutes the first item in the account rendered by the plaintiff to the defendant with the letter of his agent, dated June 1, 1878. The demand in said letter not being complied with, the plaintiff commenced this suit in November, 1879. This suit is sought to be maintained by the learned counsel for the plaintiff as a suit by a sole solvent partner to recover the assets of the firm of which he was a member, for the purpose of liquidating the affairs of the firm and distributing them according to the rights of the several partners and their representatives. The firms as to which this claim is made appear to have been solvent when dissolved, and, so far as appears, the plaintiff is a solvent partner of such of them as he was a member of, though there is no evidence that Bernard Vetterlein and Henry Thurman, who were partners in the firm of Th. H. & B. Vetterlein & Co., and Charles A. Meniar, of Vetterlein & Co., are not also solvent. It is, undoubtedly, the right of a sole remaining solvent partner to demand and take from his insolvent co-

partners the liquidation of the affairs of the firm; and this seems to be a personal right which the solvent partner cannot transfer. *Frazer v. Kershaw*, 2 K. & J. 496.

The assets of these several prior firms, so far as they had been kept separate and distinct, are admitted by the bill to have come to these bankrupts, and to have been by them, as liquidators, partly administered when they became bankrupt. The right of the plaintiff to assume their administration and liquidation, if he had such right, then at once accrued to the plaintiff against the bankrupts upon their failure, and before the petition in bankruptcy was filed. The letters of the plaintiff's agent in 1873, above recited, show very plainly that the plaintiff then understood and knew that the defendant had taken possession of all such assets, and was claiming to administer them as belonging to the estate of the bankrupts, and was reducing them to money. By the letter of twenty-seventh of May, 1873, he demanded an account and settlement as to his interest in the firms of Th. H. Vetterlein & Sons and Vetterlein & Co., and threatened a suit if his demand was not complied with. There can be no doubt from the evidence that as to all assets of these prior firms of which the assignee took possession, and of which he made any collections, his claim was adverse to that of this plaintiff, as a solvent partner seeking to recover them for himself, in order to liquidate which is the claim now made, although the claim made by the letters was not a claim for the possession of the assets in order to liquidate, but for an account and payment, out of the assets so collected, of the plaintiff's alleged interest or balance of unpaid profits in these several firms. It is noticeable, however, that in these letters of 1873 there is no reference to any claim of the plaintiff as partner in the firm of Th. H. & B. Vetterlein & Co., which now constitutes the larger part of his present claim. Not until the letter of June 1, 1878, was any claim made of an interest in that firm, and not until the filing of the amended bill in this suit—December, 1879—was this claim of a right to liquidate the assets of these prior firms made.

Whatever may have been the right of the plaintiff as a

solvent partner to obtain possession of the assets of his former firm for the purpose of liquidation, if that right had been reasonably demanded, I think it is clearly too late now for him to exercise it as against the defendant. Theodore H. Vetterlein, as one of the members in all these firms, though a bankrupt, had some interest in all their remaining assets. To put the case most favorably for the plaintiff, Theodore H. Vetterlein and Bernard T. Vetterlein had possession of them as liquidators, with an interest in them on the part of Theodore H. Vetterlein. The assignee finding them in their possession takes and holds them, having reason to believe and claiming that they belonged to the bankrupts. The plaintiff appeared on the books of these several firms as a debtor, without apparent interest in these assets, even if they still kept their distinctive character as assets of the firms to which they originally belonged. The assignee administered on them as assignee, denying the plaintiff's right to an account and payment out them, which was alone then his claim. It seems to me clear that, independently of the statute of limitations, the plaintiff's right, if he ever had any, to administer on these assets as the sole remaining solvent partner is lost by laches. He knew of the bankruptcy. Then was the time for him to assert this right, if he had it. He failed to do so. After about two years he demanded an account of money collected and payment of his pretended balances due, and after about ten years from the time, if ever, his right to liquidate accrued to him, he has brought suit. This right of a solvent partner is a privilege which he may assert or may waive. If he permits his insolvent partner or the representative of his insolvent partner to go on and administer the assets, he waives his privilege, and this, I think, the plaintiff has done. It seems to me, also, that the two-years' bar under section 5057 applies to this suit as a suit to recover these assets. The right really accrued, if at all, against the bankrupts upon their failure, or at any rate against the assignee as soon as he assumed control over these assets, upon his appointment as alleged in the bill.

There is, however, perhaps enough in the bill to support

the claim that the end may be maintained not to enforce the solvent partner's right to liquidate in case of bankruptcy of his copartners, but as a suit for an account and payment to the plaintiff out of collections made from the assets of the firm of a balance due to him from the firm. The collections made by the assignee out of any assets claimed to belong to any firm of which plaintiff was a member were all made more than four years before this suit was brought; nor is there any averment in the bill of any fraud or concealment which would prevent the statutory limitation of two years from running. Nor is there any evidence of such fraud or concealment. The assignee's claim of right to these assets under this assignment was notoriously asserted, within the knowledge of the plaintiff, from the beginning. Therefore the cases of *Bailey v. Glover*, 21 Wall. 342, and of *Zeller v. Eckert*, 4 How. 294, have no application. The plaintiff's claim, therefore, to any part of these collections is barred by Rev. St. § 5057. I am also satisfied that the plaintiff's claim against alleged assets of Th. H. & B. Vetterlein & Co. is wholly fictitious; that he never was a partner in that firm. It is stated in the bill that the balance due him on the thirtieth of April, 1865, when that firm was dissolved, and then payable, was \$22,926.62, the same balance of account above referred to enclosed in the letter of June 1, 1878. The evidence shows that at that time there stood to the credit of Theodore H. Vetterlein, his father, on the books of the firm, \$106,211.27. This \$22,926.62 is alleged to have been part of what stood to his father's credit; and it is further alleged that the succeeding firm of Theodore H. Vetterlein & Sons, without the knowledge or assent of the plaintiff, passed this \$106,211.27 on their books to the credit of his father, and that the firm of Th. H. Vetterlein & Sons collected more than \$40,000 out of the assets of the prior firm, out of which this balance due the plaintiff should have been paid; that the firm held the money in trust for this purpose, and passed it over to the bankrupts subject to this trust.

As already stated, the plaintiff was a member of the firm of Th. H. Vetterlein & Sons. He is presumed to have known

and assented to the entries in their books. He has not shown the contrary. Those books show that Theodore H. Vetterlein's interest in the old firm, exactly as it stood on the books, was passed to his credit on the books of the new firm and constituted his capital therein, on which he was allowed interest. This was done with the plaintiff's consent. It is too late for him to claim now that it was a trust fund. Whatever interest he had in his father's share was put at the risk of the business of the new firm with his knowledge and consent. It does not appear that the firm of Th. H. Vetterlein & Co. made any profits, except that of which the plaintiff's share, \$2,622, was passed to his credit. He drew out more than this, and the balance of \$19,187.91, figured out as due from that firm, is only made out by starting with the balance of \$22,926.62 as due to him from the former firm. Nothing could be plainer, it seems to me, than that the plaintiff acquiesced, as between himself and the former firm, in his father alone being entitled to the balance of the \$106,211.27, which was not as assumed in the bill cash, but the amount of his father's interest in all the property of the firm as it stood on the books. I think the testimony of Theodore H. Vetterlein and the plaintiff himself, as to the conversation between them out of which alone his claim to have been a partner in the former firm arose, shows merely a private arrangement for paying him a part of his father's profits. And against the great weight of testimony disproving his membership in that firm, there is only the naked assertions of the bankrupts and some others, unsupported by any documentary proof whatever.

The claim made in the bill as to the plaintiff's interest in the assets, which were of the firm of Vetterlein & Co., of Philadelphia, is that the plaintiff is, by agreement, entitled to the entire proceeds of collections from assets charged in the books of the firm to profit and loss, and 15 per cent. of the items, till his entire claim is paid. The bill makes no discrimination between the two firms of that name which preceded the bankrupt firm of the same name, and treats them as one continuing firm down to December 31, 1869.

On the sixth day of July, 1869, when the first of these prior firms was dissolved, there was charged off to the several partners as loss the sum of \$106,108.73, of which the plaintiff's share was \$15,916.31. This charge of \$15,916.31 entered into the final account, by which the plaintiff was on the books shown to be indebted to the firm in the sum of \$1,479.53, on the thirty-first of December, 1870, which was balanced by a charge on the books to the New York house, but which the books of the New York house do not show that they assumed or agreed to pay. As stated above, I do not find the agreement to give the plaintiff the entire amount to be collected from the items charged to profit and loss proved, and therefore, even if it be assumed that the assets of the prior firm have continued to be their assets, distinguishable from the property of the bankrupt firm, and that some part of these items has been collected, the plaintiff would not be entitled to be credited with more than 15 per cent. of the amounts so collected. I am unable, from the fragmentary accounts and the evidence produced, to ascertain how the plaintiff's account with the prior firm of Vetterlein & Co. would stand if he were credited with his share of these collections; but I think the evidence shows that, however this may be, the new firm of Vetterlein & Co., which became bankrupt, took all the assets of the old firm as their capital in business, and used it as such; that this was done with the consent of the plaintiff; and it has been held that this subjects the property, in case of bankruptcy, to the debts of the new firm. *In re Mills*, 11 N. B. R. 76.

Therefore, because the plaintiff has no case upon the merits, and because his claim, if any, is barred by the statute, the bill must be dismissed, with costs.

*In re MICHEL and another, Bankrupts.**(District Court, S. D. New York. ———, 1880.)*

1. WAIVER OF ORDER OF COURT BY THE PARTIES — EFFECT OF FINAL ORDER IN COMPOSITION.

The sheriff had possession of certain property of A. and B. attached in the suit of C. A creditors' petition was filed against A. and B., and the usual injunction issued against interfering with the bankrupts' property, which was afterwards modified "so as not to restrain the sheriff from selling the property in his possession: *provided*, that he shall deposit the proceeds of such sale in the United States Trust Company, subject to the further order of this court." A., B. and C., and the petitioning creditors, upon whose consent the foregoing order was entered, gave the officer a written waiver of the deposit in the trust company. The sheriff sold the property, and, upon being served with a final order in composition, paid C. the amount of his judgment from the proceeds. C., under order of the court, paid the sum so received into the registry of the court, with leave to apply for repayment of the same. *Held*, upon such application:

(1) That the order requiring the deposit of the proceeds of sale could be modified only by the court itself, not by the parties in interest, and therefore the retention of the money by the sheriff was in direct violation of the order of the court, and he could give no party to the cause any right to it whatever.

(2) That the final order in composition did not of itself dissolve the injunction, nor give the sheriff any right to apply the money in satisfaction of C.'s judgment.

(3) That the bankrupts having entirely failed to pay the composition, and there being strong reason to anticipate that it would be set aside and an assignee appointed, the application of C. at this stage of the proceedings must be denied.

A. Blumenstiel, for petitioner.

Armstrong & Briggs and *Mr. Palmer*, for other creditors.

CHOATE, D. J. In this case a creditors' petition was filed October 30, 1877. On the twenty-fourth of October, 1877, the sheriff of New York county had attached, in the suit of one Hellman, certain goods belonging to the bankrupts, and so held them at the time of the filing of the petition. Proceedings for a composition were taken by the bankrupts without an adjudication, and resulted in the acceptance and confirmation of the composition on the fifteenth of March, 1878.

On the thirtieth of October, 1877, the usual injunction against interfering with the bankrupts' property, except to preserve the same, was issued by this court, and was served on the sheriff on the thirty-first of October, 1877, but before the service of the injunction an execution was issued in the suit of Hellman and put in the hands of the sheriff. On the twelfth of January, 1878, an order was entered modifying the injunction "so as not to restrain the sheriff from selling the property in his possession, provided that he shall deposit the proceeds of such sale in the United States Trust Company, subject to the further order of this court." This order was entered upon the consent of the petitioning creditors, the alleged bankrupts, and of the creditors claiming liens by execution and attachment on the said property. The sheriff proceeded to sell the property as allowed by the order, having first received a paper, signed by all the parties who had consented to the entry of the above order, in the following form: "We hereby severally request the sheriff to sell the property levied upon by him, and referred to in the foregoing order, and hereby waive the deposit of the proceeds of such sale in the United States Trust Company, as therein provided." The amount realized by the sheriff was \$1,526.30. On the fifteenth of March, 1878, or very soon thereafter, the sheriff was served with a copy of the final order in composition, and thereupon, under advice of counsel that the final order in composition was, in legal effect, the setting aside of the injunction, and left him at liberty to apply the money in his hands to the satisfaction of the executions held by him against the bankrupt, he paid to the assignee of one Wallach, the earliest execution creditor, \$116.30; to said Hellman, in satisfaction of his judgment, \$596.16; and the balance he kept for his own fees and charges.

The composition was for 40 cents on the dollar, payable in equal instalments, in three, six, and nine months, for which security was given in the notes of the bankrupts with indorsers. The creditor Hellman was bound by the composition agreement.

On the twelfth of October, 1878, upon the proof that the

bankrupts had paid no part of their composition, an order was entered setting it aside, with an adjudication of bankruptcy and appointing an assignee. On the sixth of November, 1879, this last order was vacated and set aside, and declared null and void so far as it set aside the composition, on the ground that it had been entered without notice to the creditors. On the twenty-ninth of December, 1879, an order was made requiring the two judgment creditors, who had received the money from the sheriff, to pay the same, with interest, into the registry of the court, subject to the further order of the court, and with leave to apply for repayment of the same upon showing their right thereto. The money was so paid in, and the creditor Hellman now applies to have the amount paid in by him repaid.

It is not now claimed on behalf of the petitioner Hellman that the issue of the execution to the sheriff, after the filing of the petition, gave him any new claim to or lien upon the goods. His claim is that the final order in composition dissolved the injunction and left the money in the hands of the sheriff, the absolute and unencumbered property of the alleged bankrupts, subject only to the rights of the judgment creditors, whatever they may have been; that it was property which the bankrupts could, with the consent of those creditors, have demanded of the sheriff and used in their business, or applied to the payment of their composition notes, or to the payment of these particular debts. And it is further contended that the bankrupts, having known of the disposition made of the money by the sheriff, and acquiesced therein for nearly two years, must be deemed to have approved of and ratified the use made of their money. There is, however, an obvious answer to this argument. In the first place, the holding of the money by the sheriff at the time of the final order in composition was in direct violation of the order of the court. The consent of certain parties to waive the deposit of the money in the trust company, which the court had ordered, could not have the effect of dispensing with the deposit, even if the consent had been given by all the parties in interest. It is for the court to judge where money shall be placed in

order to secure its safety, and not for the parties, and the orders of the court in that respect must be strictly observed, unless modified by the court itself. But the parties consenting were a small part only of the parties in interest; that is, the whole body of creditors for whose protection the order was made. Therefore, so long as the sheriff held the money in violation and contempt of the order of the court, he could give no party to the cause any right to it whatever. So far as the parties in this cause are concerned, who had notice of the facts, they could take no greater right in the money than they would have been able to take if the order had been obeyed and the money had been deposited in the trust company, subject to the order of the court. Nor did the final order in composition operate of its own force, and without a further order of the court, to place at the disposition of the bankrupts money belonging to their estate held by the sheriff, subject to the order of the court.

A final order in composition is not a final disposition of the proceeding in bankruptcy. The case in bankruptcy is still pending, and the power of the court continues to stay the proceedings of creditors in suits pending against the bankrupts so long as the composition is unpaid, (*In re Bagley*, 19 N. B. R. 73; *McGehee v. Hentz*, Id. 139;) and a conclusive answer to this claim is that the bankrupts themselves could not, without an order of the court, have possessed themselves of the money and paid it in satisfaction of the lien of this creditor, if he had a valid lien by his attachment. It is true that the terms of the composition were such that, if the composition agreement is performed, the lien of an attachment, less than four months old at the time of the commencement of these proceedings, will remain, and this petitioner will be entitled to the money. And, as things stood when the sheriff paid over the money, it is very probable that upon application to the court the money so subject to the order of the court would have been applied to the payment of the petitioner's claim. Although it would be within the power and discretion of the court to stay petitioner's proceedings until it was ascertained whether the composition agreement

would be carried out, and so all possibility of dissolving petitioner's lien put an end to, yet, if there was no reason to anticipate any difficulty in the carrying out of the composition agreement, the petitioner might have had his money. *McGehee v. Hentz*, 19 N. B. R. 137. But as this creditor took the law into his own hands, and appropriated the money without leave of the court, subject to whose order it was held, the merits of his application for satisfaction of his lien must be determined by the state of facts existing now, when he first asks leave of the court to take the money. The circumstances have entirely changed. The bankrupts have entirely failed to pay the composition. They have been again ordered to do so, and proceedings are pending against them to have them punished for a wilful neglect to to pay the composition.

There is now strong reason to anticipate that the composition will be set aside and an assignee appointed, if the appointment already made is invalid, as is claimed by this petitioner, and in that case the petitioner's attachment will be dissolved and this money will be distributed among the creditors.

Motion denied, without prejudice to its renewal in case, upon the termination of pending proceedings, the composition shall not be set aside.

In re STEVENSON and others, Bankrupts.

(District Court, W. D. Pennsylvania. April 25, 1881.)

1. BANKRUPTCY COURT—POWER TO SET ASIDE PRIVATE SALE.

For good cause shown the court may set aside a private sale of the real estate of a bankrupt made under its decree, even where the sale has been consummated and a deed delivered to the purchaser, if application by a party in interest to set the sale aside is made in due time.

2. SAME—SAME—BONA FIDE PURCHASER.

In such case the court may set aside the sale and vacate the decree under which it was made, notwithstanding the purchaser from the assignee, the next day after he received his deed, conveyed the title to his father, who claimed to be a *bona fide* purchaser.

In Bankruptcy. *Sur* petition of W. K. Jennings, administrator *de bonis non cum testamento annexo* of John Stevenson, deceased, to set aside a private sale of the real estate of the bankrupts, made by the assignee, as per order of court, to William M. McElroy.

W. K. Jennings, for estate of John Stevenson, deceased.

John M. Kennedy, for assignee.

John Barton, for purchaser.

ACHESON, D. J. The order authorizing the private sale in question was made during the present term of court, to-wit, on February 18, 1881, but it was not consummated by the delivery of the deed to the purchaser until February 26th, or later. The petition to set aside the sale was presented March 15, 1881. No report of the sale was made by the assignee to the court, and this, perhaps, was not necessary. However, I am clearly of opinion that for good cause shown the court has the power to set aside such sale, at least during the term at which the order to sell is made. Act of June 22, 1874, § 5062*b*; Bump, —; Blumenstiel, 250; *In re Ryan*, 6 B. R. 235. The act of June 22, 1874, declares "that, unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. * * * And the court, on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same, and to order a resale, so that the property sold shall realize the largest sum."

Undoubtedly, this latter provision is broad enough to embrace a private sale of the real estate of a bankrupt made under an order of court authorizing it. And I am of opinion that, even where such sale has been consummated by a delivery of a deed, the court, in a proper case, may exercise the power to set aside the sale, if application is made within due time. Here, I think, it was made in due time; for we are in the same term at which the order to sell was made, and the application to set the sale aside, which is by a party in inter-

est, was made as soon as he learned the fact of the sale, and within 18 days after it was made.

W. K. Jennings, as administrator of the estate of John Stevenson, deceased, it would seem, is much the largest creditor of the bankrupts. His debt as proved amounts to \$32,081.16, while the whole amount of indebtedness proved is something less than \$80,000. Mr. Jennings is a home creditor, residing within the city of Pittsburgh, and personally well acquainted with most of the real estate in question. Most certainly he was entitled to notice of the application for the order to make the proposed private sale, and such was the view of the assignee, for he testifies that he had requested his counsel to give information to Mr. Jennings, and was under the impression it had been given. But, by some misapprehension, notice was not given Mr. Jennings; he knew nothing of the application, order, or sale until within three days of the presentation of his petition to set aside the sale.

When the assignee stated in his petition for leave to sell to William M. McElroy that he had "conferred with some of the principal creditors of said bankrupts, and they advise him to accept said offer," the court had a right to assume that the assignee had not overlooked the principal home creditor. And, indeed, it is shown that both the assignee and his counsel had good reason to believe that Mr. Jennings knew and approved the proposed sale. In that belief the counsel acted. The evidence before the court justifies the conclusion that the price at which McElroy bought is grossly inadequate. Certain it is that authority to make the sale to him at his offer would not have been granted had the facts now shown appeared to the court. It now appears that Mr. McElroy was the nominal purchaser only; that he was acting for E. L. Barton, the brother-in-law of A. K. Stevenson, one of the bankrupts, and that Stevenson negotiated with the assignee for the purchase. As the court would not have authorized the sale to McElroy if the facts had been disclosed, it cannot now give its sanction to that sale or permit it to stand. It is, indeed, true, that on the first day of March, 1881, McElroy conveyed the interest he acquired under his deed from the

assignee to E. L. Barton, who the next day made a conveyance for part of that interest to his father, John Barton, Esq. The consideration for the conveyance to the latter was an exchange of properties between the father and son. Mr. John Barton has been heard in opposition to the petition to set aside the sale to McElroy. In his answer and testimony he states that he was an entire stranger to the court proceedings, and knew nothing of the matter until after McElroy got his deed from the assignee, and that he made the exchange of properties with his son and took the conveyance from the latter in entire good faith. But, in view of the relations between the parties, and the peculiar circumstances of the case as disclosed by the testimony, I am of opinion that he is chargeable with the notice that the sale to McElroy was impeachable, and liable to be set aside by the court. The conveyance to Mr. Barton, Sr., under all the facts, in my judgment ought not and does not constitute any obstacle to an order setting aside the sale to McElroy and vacating the decree under which it was made. Such order will be made, and a public sale ordered, upon the filing of a bond, with approved surety, to secure the bid at public auction offered in the stipulation which accompanies the petition of W. K. Jennings.

SMITH and others v. MERRIAM and others.

(Circuit Court, D. Massachusetts. January 22, 1881.)

1. RE-ISSUE—COMMISSIONER OF PATENTS.

The decision of the commissioner of patents as to the mere necessity of a re-issue is conclusive.

2. SAME—SAME.

A mistake as to the necessity of such re-issue does not constitute an excess of jurisdiction.

3. SAME—VARIATION OF CLAIMS.

Upon such re-issue the claims may be varied in order to express the real invention.

4. SAME—SAME.

The grant of a re-issue in order to enable the patentee to claim the actual operation of his tools in detail is authorized by statute.

5. RE-ISSUE No. 7,558—NOVELTY.

Re-issue No. 7,558, for a presser-foot for a sewing machine, intended for sewing stay strips upon boots and shoes, *held not void* for want of novelty.—[Ed.]

In Equity.

Geo. L. Roberts & Bros., for complainants.

E. P. Brown, for defendants.

LOWELL, C. J. The original patent in this case, No. 177,-296, dated May 9, 1876, describes a presser-foot for a sewing machine, intended for sewing stay-strips upon boots and shoes. These are narrow strips of leather sewed over that seam of the upper leather of the shoe which covers the heel or the instep, to protect the seam from the wear of the dress. The strip is folded or doubled over and sewed on each side of the central ridge, or projection of an outward-turned seam, and has a groove on each side, in which the stitches are to be laid. The presser-foot has a groove to fit the projecting seam, and two ribs, or fillets, as they are called in the original patent, to form the grooves. The hole for the needle is made in one of these ribs. One row of stitches is laid, and then the work is turned round and the stitches are laid along the other edge. All this is shortly, but sufficiently, set forth. There is described, besides, a "folding mouth," or tunnel, through which the plain strip is to be passed, in order to be folded or doubled over into the requisite shape. The claim is for "a sewing machine presser-foot, provided with means, substantially as described, for folding and channelling a seam-stay piece, such consisting of the fillets, *e, e*, and of the folder, composed of the tapering mouth, *a*, [and] the partition, *d*, all being arranged with the guide-groove, *b*, and needle-hole, *f*, as set forth."

Soon after this patent was taken out, it was found much more economical and convenient to fold and crease the stay-strip by a separate machine or operation, and then the plaintiff obtained the re-issue, No. 7,558, which is relied on in this case.

In the re-issue, the operation of sewing the stay-strip is described with more fulness of detail than in the patent, and the single claim is replaced by three.

(1) A sewing machine presser-foot for use in sewing stay or saddle pieces to seams, the acting or under face of which is formed with a recess, consisting of a longitudinal central recession to receive the saddle part of the stay-strip, and of side recessions to contain the part of the strip intervening between its central saddle part and its edges, substantially as set forth.

(2) The presser-foot, framed with central and side recessions, as described, and with parallel ribs intervening between the central recessions and side recessions, as set forth.

The third is like the single claim of the original, and is not in issue here.

Upon comparing the claims of the patent and the re-issue, it seems that the patentee has separated his folding mouth from his presser-foot proper; and has also claimed a presser-foot which has recessions or recesses calculated to receive the central and outer swells or beads, whether the grooves for the stitches are formed by the action of the ribs of the presser-foot in the operation of sewing, or had been made in the stay before it is brought to the sewing machine.

The first question which arises is whether the re-issue is valid. Supposing for the present that the thing shown and described in the two patents is the same,—that the presser-foot, which will fit over the seam and make the grooves, and cause the stitching to be made in them, will fit over the bead-shaped edges and cause the stitches to be laid in the grooves which have been made beforehand, and that it will work as a presser-foot upon a seam folded beforehand, independently of the action of the folding mouth,—can the patentee, by a re-issue, modify or divide his claims, so as to embrace these several distinct features of his tool?

A case has been brought to my notice, decided by Mr. Justice Field, on his circuit, which is supposed by the patent lawyers to indicate a new departure in the law of re-issued patents. The high authority and great importance of that

decision will be my apology for a discussion, which, a few weeks since, would have been unnecessary. The case is *The Giant Powder Co. v. The California Vigorit Powder Co.* 18 O. G. 1339; S. C. 4 FED. REP. 720.* In it the learned judge is understood to declare that if the court can discover, upon a comparison of the two instruments, that there was no defective specification to be amended, and that the claim was not broader than the invention, the action by the commissioner in granting a re-issue was in excess of his jurisdiction, and void; and that if the patentee claims too little, instead of too much, his specification is not defective by reason of that mistake, but all which he did not claim was dedicated to the public. I do not mean to say that I consider the decision to be as extensive as this; but it is so understood by some members of the bar; and there are remarks in the opinion which lend a color to such a construction.

The Revised Statutes simply re-enact the law upon this subject which has been in force since 1836: "Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent, and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued." Section 4916.

The most natural construction of this law would, perhaps, be, that if a patent should be inoperative by reason of a defective specification, or invalid for claiming too much, the defect might be supplied, or the excessive claim be reduced by re-issue. But the courts have given a very different interpretation—much wider in most respects, and narrower in only one. They do not permit a defective specification to be supplied, excepting from the drawings or model; but they do permit the claim to be varied, provided the same invention is

described in both patents, and hold that the decision of the office that the occasion had arisen for granting a re-issue is final. The law is extremely liberal, perhaps too much so, and has been much abused; but if we change it suddenly we shall make a destruction of titles which it is impossible to contemplate without dismay.

If the court is to decide, by inspection of the original patent, that it was not defective, the result is this: That after a patentee, upon the best advice which he can obtain, has been instructed that his specification needs amendment, and obtains a new patent, the court may say, "We are unable to see any defect, and your re-issue, however honestly obtained, is bad, because your original patent was so good."

The mistake is one of law, and the commissioner does not usually decide the law finally; but as to the mere question of the necessity for a re-issue, supposing the new patent itself to be unobjectionable, his decision has always been held to be final; and this for an unanswerable reason, that no patentee, however honest or careful, can be safe in obtaining a re-issue, if he is to be informed, when he gets into court, that the judge is unable to see why he should have surrendered his first patent. The slighter and more obviously unobjectionable the change, the stronger will be the argument that there was no occasion to make it; so that honest and careful patentees will be the most likely to suffer.

It does not help the matter to call the action of the commissioner an excess of jurisdiction. I know that the courts have called these mistakes jurisdictional. They did this to overrule, without positively saying so, the early cases which held the action of the commissioner within his jurisdiction to be final. It is obvious that the commissioner has the same jurisdiction to issue a bad patent as to issue a good one. As his action is *ex parte* it does not bind the world, excepting in certain matters which it is both unjust and inconvenient to review. A mistake by him as to the necessity of issuing a new patent is not an excess of jurisdiction, but a mistake in a matter clearly within his jurisdiction; and the real ques-

tion is whether it is one which the courts will correct by destroying a new patent after the old one has been surrendered.

Upon questions of the validity of a patent, or of a re-issue, in all great matters of novelty and construction and patentability, the decision of the commissioner is not final, though his jurisdiction is undoubted; but I repeat that urgent reasons of justice require that upon the mere question whether the paper called a re-issue shall be given, his finding should be, as it has hitherto always been held to be, conclusive.

Again, if it be found that the claims of the original patent were valid, and that the re-issue for the same invention states the claim or claims in a different way,—though it may be a better way for the patentee,—the change does not of itself vitiate the new patent; but, on the contrary, the original claims are conclusively presumed to have been made as they were through inadvertence, accident, or mistake. The law is so well settled that most of the reports do not contain the claims of the two patents; but I suppose that no re-issue has ever contained the exact claims of the original, and this can be discovered, incidentally, in many of the cases, and positively in some, where the very point is passed upon. See *Allen v. Blunt*, 3 Story, 742; *Stimpson v. Westchester R. Co.* 4 How. 380; *O'Reilly v. Morse*, 15 How. 62; *Batten v. Taggart*, 2 Wall. Jr. 101; S. C. 17 How. 74; *Bennet v. Fowler*, 8 Wall. 444; *The Goodyear Cases*, 2 Wall. Jr. 283, 356; 2 Cliff. 351; 9 Wall. 798; *Seymour v. Osborne*, 11 Wall. 516; *Roberts v. Ryer*, 91 U. S. 150; *Marsh v. Seymour*, 97 U. S. 348; remarks of *Bradley, J.*, in *Powder Co. v. Powder Mills*, 98 U. S. 136, and of the same learned judge in *Carlton v. Bokee*, 17 Wall. 463, where he intimates that a re-issue may be good as to those claims which agree with the invention, and void as to others which exceed it; *Cochrane v. Deener*, 94 U. S. 780; *Conover v. Roach*, 4 Fisher, 12; *Stevens v. Pritchard*, 10 O. G. 505; *Herring v. Nelson*, 14 Blatchf. 293; *Johnson v. Flushing R. Co.* 15 Blatchf. 192; *Analin Co. v. Higgins*, Id. 290; *Pearl v. Ocean Mills*, 11 O. G. 2. None of

these cases, unless it be *Batten v. Taggart*, 17 How. 74,—which is perhaps inconsistent with *Leggett v. Avery*, 101 U. S. 256,—has been overruled; and a great many similar cases could be cited. It has been brought out a little more decidedly by the later cases that the invention must be the same; but it has never been held in the supreme court, or any circuit court, so far as I can discover, that the commissioner's decision is not final as to the propriety of a re-issue, as distinguished from its validity upon what may be called its merits; or that the claims may not be varied to express the real invention. The claim is part of the specification, and if defective may be amended. *Russell v. Dodge*, 93 U. S. 460, in which the decision is given by Mr. Justice Field, and which is cited by him in the *Powder Co.'s* case, merely decides that a re-issue which claims a different invention is void. A similar decision has been made at this term of the supreme court, in giving which Mr. Justice Strong states the law in the old way, that the commissioner's decision is final as to the mistake, but not as to the identity of invention. *Ball v. Langles*, 18 O. G. 1405. The only cases which he cites are *Seymour v. Osborne* and *Russell v. Dodge*, which he evidently considers to be consistent with each other.

I conclude, therefore, that the re-issue was granted to correct some inadvertence, accident or mistake. Whether it is valid is quite another matter. I have read with diligence the very voluminous record, and am satisfied that the presser-foot described and shown in the original patent and model has the functions claimed in the re-issue. It was a tool which was fitted for a particular purpose, and if the claim had been well adapted to the invention it would not have been necessary to re-issue the patent, for no one could have justified a piracy of the presser-foot by omitting to use the folder which was attached to it. The tool was not a combination, but an aggregation of two entirely distinct tools, one to fold and one to press; that is, hold the work to be sewed. The doubt whether the presser-foot would work by itself was dissipated by the evidence, and by a successful experiment in open court.

So it will operate and produce its results as a presser-foot, though not all the results, when the grooves have been made in the stay-strip before it is sewed.

The re-issue, then, was granted in order to enable the patentee to claim the actual operations of his tool in detail, which is a perfectly legitimate reason for a re-issue, until the law is changed by congress or the supreme court.

One great dispute of fact is whether the invention was, in fact, new. One Turner swears that he made a presser-foot of the same sort seven years earlier. Turner was employed by the plaintiffs to sell their presser-foot, and, while so employed, tried to undersell them with one of his own. For this fraud he was discharged, and went into the employ of the defendants, and procured a patent on his presser-foot. How this came to be granted, without an interference, I am not informed. The invention appears to me to be, in substance, identical with that of the plaintiff. However, Turner says that this was a revival of a presser-foot which he had made years before, and there is some testimony to support him. It is open to the criticism so often made upon such remembered inventions, which never went into general use. Against it, the plaintiffs bring strong negative evidence of many persons who must have seen and used the thing if it existed. They go further, and bring thirty witnesses to impeach the character of Turner for truth; and two who swear that he tried to bribe them to remember his presser-foot. None of the evidence to character is met, or attempted to be met, excepting by the testimony of one of the defendants. It is not made out, to my satisfaction, that Turner made his presser-foot before Sutherland made his.

The respondents insist that Turner's presser-foot, whenever it may have been invented, differs essentially from that of Sutherland, in that it has its central recession or depression much deeper than those upon the sides, so that it will fit much better the ordinary shape of an outward turned seam. This argument is used both as to novelty and as to infringement. I find, however, as matter of fact, that Sutherland's foot is

capable of doing the work; and, that being so, the precise relative proportions of the recessions are matters for the constructor.

With this view of the patent, it is admitted that the respondents have infringed it.

Interlocutory decree for the complainants.

LOCKWOOD v. CLEVELAND.

(Circuit Court, D. New Jersey. February 28, 1881.)

1. INTERFERING PATENTS—CROSS-BILL—REV. ST. § 4918.

In a suit against an interfering patentee under section 4918 of the Revised Statutes the defendant is not required to file a cross-bill in order to obtain affirmative relief.

2. CROSS-BILL DISMISSED—COSTS.

The cross-bill was therefore dismissed in this case, upon the motion of the complainant, as having been improvidently filed, but, under the circumstances, costs were not allowed.—[Ed.]

In Equity. Motion to Dismiss Cross-bill.

Browne & Whitter, for complainant.

Munson & Philipp, for defendant.

NIXON, D. J. This is a motion to dismiss a cross-bill, as improvidently filed. The circumstances under which the bill was filed are as follows: On the seventh of September, 1875, the commissioner of patents issued to Rhodes Lockwood letters patent No. 167,455, for "Improvement in India-rubber erasers." On the twenty-fifth of May, 1877, one Francis H. Holton, claiming to be the original and first inventor of a certain improvement in erasive rubber, by an assignment in writing, sold and transferred unto Orestes Cleaveland all his right, title, and interest in and to said improvement, which assignment was duly recorded in the patent-office of the United States, September 27, 1878, in Book J 23, p. 296, of transfers of patents. On the ninth of June, 1877, the said Holton made application to the commissioner for letters patent for said improvement. The commissioner being of the opinion that the application interfered with the letters v.6,no.7—46

patent No. 165,455, before issued to Lockwood, gave notice on the fifth of November, 1878, to the parties in interest, as required by section 4904 of the Revised Statutes, and directed the primary examiner to proceed to determine the question of the priority of invention. Testimony was taken and a hearing had,—the respective parties being represented by counsel,—and on the twelfth of December, 1879, the examiner adjudged Holton to be the prior inventor of the improvement. An appeal was taken from this decision to the board of examiners in chief, which, after hearing the parties, reversed the primary examiner, on the twenty-fourth of February, 1880, and adjudged Lockwood to be the prior inventor. On an appeal from this last judgment to the commissioner of patents, the commissioner, on the third of May, 1880, held that Holton was the original inventor of the improvement, but refused to grant the letters patent applied for, on the ground that the invention had been in public use and on sale for more than two years prior to Holton's application. From this last judgment, Holton took the case by appeal to the supreme court of the District of Columbia, which reversed the commissioner, on the twenty-eighth of September, 1880, and decided that Holton was entitled to his letters patent. They were accordingly issued to Cleaveland, as the assignee of Holton, on the nineteenth of October, 1880, numbered 233,511.

This condition of affairs existing between the parties, on the second of November, 1880, Lockwood filed a bill in this court against Cleaveland, setting forth the existence of the two patents, and their interference, one with the other, and praying that the defendant's letters patent might be decreed void, and that he might be restrained, by injunction, from instituting any suit at law or in equity for any alleged infringement thereof. The defendant has answered, denying that Lockwood was the original and first inventor of the improvement described in his letters patent, and claiming that he, as the assignee of Holton, is entitled to the invention, and concluding with the prayer that the complainant's patent may be adjudicated void. Simultaneously with the answer, and by leave of the court, the defendant, Cleaveland, also filed a

cross-bill, praying that the complainant's patent might be declared void, and that he might be restrained from bringing any action in any court for an infringement of the same.

The counsel for the complainant in the original suit now asks the court to dismiss the cross-bill, on the ground that section 4918 of the Revised Statutes affords all the relief in the original suit which the defendant can possibly have in the cross-suit. The motion involves the true construction of that section, which is a substantial re-enactment of section 16 of the patent act of 1836, as amended by section 10 of the act of March 3, 1839. It provides that, "whenever there are interfering patents, any person interested in any one of them * * * may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent, and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void, in whole or in part. * * *" The design of the provision is obvious. The congress meant to give a speedy and complete remedy to the owners of interfering patents, and, to this end, to clothe the courts with jurisdiction to adjudge and declare either of the patents void, in whole or in part, or inoperative or invalid in any particular part of the United States. The difficulty and doubt arise wholly from the phrase "*due proceedings had according to the course of equity*," which seems to have been added to the previous legislation, and intended as a limitation upon the remedy, and to conclude the parties to three modes of procedure recognized in equity practice.

Nothing is more firmly settled in equity than that where a defendant seeks the aid of the court for the purpose of enforcing affirmative rights, he must file a cross-bill, although such a course is not necessary when he relies upon his rights merely as a defence to the relief sought against him. 2 Dan. Ch. Pr. 1550*.

The general rule is that he cannot have any positive relief against the plaintiff, even on the subject-matter of the suit, except by cross-bill. Story, Eq. Pl. § 396, n. 3; *Miller v.*

Gregory, 1 C. E. G. 274; *Scott v. Lalor's Ex'rs*, 3 C. E. G. 301; *Leddell v. Starr*, 4 C. E. G. 159; *Allen v. Roll*, 10 C. E. G. 164; *Pattison v. Hull*, 9 Cow. 747; *Morgan v. Tipton*, 3 McL. 344; *Carnochan v. Christie*, 11 Wheat. 446. But there are exceptions to this rule in the more modern practice; as, for example, in the case of a suit for specific performance. The supreme court of the United States, in *Bradford v. The Union Bank of Tenn.* 13 How. 57, adopted the practice first suggested by Sir William Grant, master of the rolls, in *Staplyton v. Scott*, 13 Ves. 425, and sanctioned by Lord Eldon in *Fife v. Clayton*, Id. 546, and dispensed with a cross-bill and granted relief to the defendant, on his answer to a bill for the specific performance of a contract, wherein an agreement was set up differing in many particulars from the one on which the bill of complaint was founded. The court regarded such a departure from the established practice justifiable, "as most convenient and expeditious in settling definitely the rights of the parties, and for the sake of saving further litigation and expense."

It is quite clear, from the reasoning of the court in the opinion deciding the case, that if the same learned tribunal should be called upon to construe the section under consideration, it would have no difficulty in finding in its provisions ample authority for the courts to give affirmative relief to a defendant, on an answer which denies validity to the complainant's interfering patent. But, whether this be so or not, all the courts which have had occasion to construe the section have assumed or decided that they had jurisdiction over all the interfering patents, upon a bill filed, and that on proper issues formed by the pleadings, without the intervention of a cross-bill, affirmative relief could be granted to either of the parties entitled to it, by declaring one or the other, or all, of the patents void or valid.

The case of *The Gold & Silver Ore Separating Co. v. The United States Disintegrating Ore Co.* 6 Blatchf. 307, invoked the jurisdiction of the court, under the sixteenth section of the act of July 4, 1836, and was heard by Judge Blatchford, on bill and answer. The bill alleged that on the eighth of

March, 1864, letters patent were granted to one John B. Gale, as assignee of William E. Hogan, for an "improvement in stoves;" that on the sixth of June, 1865, the said patent was surrendered, and re-issued in two separate patents, and that one of the two, numbered 1,988, was for an "improvement in furnaces for treating ores by superheated steam;" that on the third of January, 1865, letters patent No. 45,803 were issued to C. D. De Forest and others, as assignees of Melchoir B. Mason, for an "improved method of desulphurizing and oxygenizing metallic ores;" that Hogan was the original and first inventor of the improvements claimed in the re-issue No. 1,988; and that the invention therein described was identical with that covered by the Mason patent. The bill prayed that the last-named patent might be adjudged to be void.

The answer set up in defence that the original patent to Gale was not for the same invention as that described and claimed in the Mason patent; that Mason was the prior inventor of the inventions therein patented, and that the said re-issue No. 1,988 had been procured and the claims expanded for the purpose of fraudulently covering the inventions of Mason. It then prayed that the court would decree the re-issue to be void and the patent No. 45,803 to be valid. The proofs were taken and the case argued upon the issues raised by the pleadings, and the court decided the several questions, (a) of interference between the patents, (b) of priority of invention, and (c) of the validity of the respective patents, holding that one was good and the other bad. The cause was argued by Mr. Keller for the complainants, and by Mr. Gifford for the defendants, and the best evidence that the method of procedure was regular is found in the fact that neither of these distinguished patent lawyers suggested a doubt, on the argument, that the court had authority, under the provisions of the statute, to decide such issues upon bill and answer.

The next case, in the order of time, is *The Union Paper Bag Co. v. Crane*, reported in 6 O. G. 801, tried before Judges Clifford and Lowell. The bill was filed under section 4918

of the Revised Statutes, and alleged that the complainants owned a patent, granted to them December 24, 1872, as assignees of one L. D. Benner, for an improvement in paper bags, of which Benner was the original and first inventor; that the defendants held a patent, dated February 20, 1872, for an improvement alleged to have been invented by Luther C. Crowell; that the patents interfered; and the complainants prayed that the defendants' patent might be declared void. The answer denied that Benner was the prior inventor of the improvement patented to the complainants; insisted that Crowell was the inventor of that held by the defendants; neither confessed nor denied the interference; but concluded with the prayer that the complainants' patent should be adjudged void. The court considered the issues upon these pleadings, and, on a comparison of the specifications of the two patents, held that they described and claimed the same invention, and that Crowell was the true and first inventor; thus reversing the judgment of the patent-office, which had declared an interference, examined the case, and decided in favor of Benner. The decree passed by the court declared the defendants' patent to be good and valid, and the complainants' to be void.

The only other case, involving a construction of the section under consideration, that I have been able to find, is that of *Foster v. Lindsay*, 3 Dill. 126, in which Judge Treat, sitting in the circuit court for the eastern district of Missouri, expressly held that the section vested the power in the court to adjudge either of the interfering patents void, in whole or in part, and also authorized a decree that both patents were void. The learned judge found a support to his opinion in the allusion made by the supreme court in *Mowry v. Whitney*, 14 Wall. 440, to the scope and purport of the sixteenth section of the act of 1836. The defendant had set up in his answer that both of the interfering patents were void for want of novelty. The court allowed the defence to the action, and said that the power conferred by the statute to declare either of the patents invalid, in whole or in part, necessarily included full authority, where the evidence justified, on the issues made,

to decree, not one of the patents alone, but both to be void, and adjudged accordingly.

Upon the whole case, I am of the opinion that the motion of the complainant must prevail, and the cross-bill be dismissed; but, under the circumstances, without costs.

MARKS v. Fox and another.

MARKS v. SCHWARTZ and another.

(Circuit Court, S. D. New York. December 10, 1880.)

1. RE-ISSUE No. 7,808—"IMPROVEMENT IN CAPS."

Re-issued letters patent No. 7,808, division B, for an "improvement in caps," does not contain new matter, and is not broader than, and, for an invention, different from, that described in the original patent.

2. PRIOR USE—EVIDENCE.

Evidence of prior use is inadmissible when such use is not set up in the pleadings.—[Ed.]

Frederic H. Betts and *C. Wyllys Betts*, for plaintiff.

Gilbert M. Plympton, for defendants.

BLATCHFORD, C. J. These suits are founded on re-issued letters patent No. 7,808, Division B, granted to the plaintiff July 24, 1877, for an "improvement in caps," the original patent having been granted to him August 3, 1875. The specification of the re-issue, embracing what is outside and what is inside of brackets, and excluding what is in italics, says: "Figure 1 represents a side view when the [swinging] ear and neck protector is pulled down. Figure 2 is a vertical central section when the ear and neck protector is up. Similar letters indicate corresponding parts. This invention consists in an ear and neck protector connected to the back part of the crown of a hat or cap by a tape [or cloth] and to *its* [the] sides [or near the front of the hat or cap] by loops and buttons, or other equivalent fastenings, in such a manner that, whenever it may be desirable, said protector can be

drawn down to cover the ears and *the* neck of the person wearing the cap, and, when no such protection is needed, said protector can be raised, when it serves to impart to the cap a finished appearance. In the drawing the letter A designates a cap, to the rear part of which is attached my ear and neck protector, B. The protector is held in place by a tape, [or cloth,] *a*, *in its middle*, [at the back,] and by loops, *b*, which are fastened to its ends and catch over buttons, *c*, secured to the body or crown of the cap, [at the sides or near the front,] said fastenings being so constructed that the protector swings up and down as far as the tape, [or cloth,] *a*, will allow, the buttons, *c*, forming the centers on which the swinging motion takes place. It is obvious that for loops and buttons other devices may be substituted without deviating from my invention. *My cap is ornamented in front by a band, C, and, if the protector, B, is raised, it forms a similar band on the back part of the cap, and thereby a finished appearance is imparted to the article.* In cold or inclement weather the person wearing my cap can draw down the protector, B, to the position shown in figure 1. In this position the lower edge of said protector hugs the neck of the person wearing my cap with a close fit, and at the same time the ears of said person are covered, so that those parts are carefully protected against cold air, wind, rain, or snow. My cap is exceedingly simple in its construction; it can be made and sold at a low cost, and it is of great convenience, particularly *for* [to] persons compelled to spend much of their time in the open air."

The claims, three in number, are as follows: "(1) As a new article of manufacture, the head covering, A, with a swinging ear and neck protector, B, attached near the front by buttons and loops, or other equivalent devices, upon which the neck protector swings as an axis, and attached at the rear by a tape or cloth, which prevents the upper edge of the protector from swinging below the lower edge of the hat or cap, the said several parts being constructed and combined substantially as described; (2) the swinging or sliding neck protector, B, constructed substantially as described, so as to swing or slide on fastenings at the sides or near the front of

the cap; (3) the swinging or sliding neck protector, B, constructed substantially as described, so as to swing or slide on fastenings at the side or near the front of the cap, and connected with the cap at the back by a tape or cloth to prevent it from swinging or sliding below the lower edge of the hat or cap." Reading the foregoing specification, (excluding the claims,) by leaving out what is in brackets, and including what is in italics, gives the specification of the original patent, and shows the differences between the original and the re-issue. The claim of the original was in these words: "As a new article of manufacture, the head covering, consisting of the crown or body, A, band, C, ear and neck protector, B, tape, *a*, and fastenings, *b*, *c*, said protector being arranged upon the exterior of the article, substantially as described, and adapted to move up and down thereon."

It is contended for the defendants that the re-issue contains new matter, and is broader than, and, for an invention, different from, that described in the original patent. Exception is taken to the introduction into the body of the re-issued specification of the words "or cloth," and of the words "or near the front," and to the omission of the words "in its middle," and the substitution of the words "at the back;" also, to the introduction into the first claim of the re-issue of the words "or cloth," and of the words "which prevents the upper edge of the protector from swinging below the lower edge of the hat or cap." It is urged that in the re-issue the location of the tape is undefined; that there is no warrant in the original patent for adding the words "or cloth;" and that there is nothing by way of description, in the original or in the re-issue, suggesting that the tape prevents the upper edge of the protector from swinging below the lower edge of the hat or cap. It is plain, from the description in the original specification and the drawings, that a "cloth" substituted for a "tape," in the same location and attached in the same manner, will perform the same office that a tape does. In fact, a tape is a cloth, and a cloth, *quoad* what it has to do, where it is to be, is a tape. The words "or near the front" are fully authorized by the original description and by the drawings.

The buttons, *c*, over which the loops catch, are not only at the sides, but are near the front. They form centers for the swinging motion of the protector up and down, as the original specification states. The drawings show the buttons near the front, as compared with the position of the swinging protector. The original specification and the re-issue state that figure 1 represents a side view when the protector is down. In that side view the upper edge of the protector is above the lower edge of the hat or cap. The original specification and the re-issue state that the protector swings up and down as far as the tape, *a*, will allow. The plain construction of the whole language is that the tape is not to allow the protector to swing so far down that the upper edge of the protector will be below the lower edge of the hat or cap. Therefore the language of the first claim of the re-issue was warranted. According to the original specification the band, *C*, was no part of the invention, yet it is made a part of the claim of the original. Hence the re-issue was proper to change the claim, and nothing which can be called new matter was inserted in the specification of the re-issue.

The caps made by the defendants, Fox 1, Fox 2, Fox 3, Schwartz C, and Schwartz D, contain the same arrangement as that shown by the plaintiff's patent. The fact that the defendants' tape or cloth behind, in addition to being in the middle at the back, extends around towards the front on each side, makes no difference. The connecting tape is there, behind, where it is needed. It is flexible, and folds up, when the protector is raised, as in the plaintiff's cap. The protector in the defendants' caps cannot swing below the lower edge of the cap proper. The tape in the defendants' caps is so attached that when the protector is down the tape or cloth is not visible. But that is, at most, an improvement. The defendants' caps have, all of them, either a positive connection towards the front of the cap on which the forward end of the protector turns, and on which the protector swings, or else the arrangement is such that the forward ends of the protector hug the cap so closely that when the rear part of the protector is pulled down the forward parts do not also go

down, but remain, and the protector swings as on a pivot. It may also be true that, under certain circumstances, the strip of muslin between the protector and the cap, in the defendants' caps, acts to guard against all danger of the admission of wind or rain between the protector and the cap. But this, too, is at most an improvement. The defendants' caps contain all the arrangements found in the plaintiff's cap, operating in the same way and producing the same result. They contain all the features of difference which distinguish the plaintiff's cap from the old double-band cap and the old turn-over single-band cap. The defendants' caps infringe all the claims of the re-issue, Division B.

It is contended by the defendants that they have shown, by evidence, that caps like the plaintiff's cap, and caps like the defendants' caps, existed before the plaintiff's invention. The evidence is very voluminous. A careful examination of it leads to the conclusion that the defendants have failed to make out this defence. Not a cap is produced which is claimed to have been made before the plaintiff obtained his patent. Everything depends on the recollection of dates and structures, and on the reproduction now, from memory, of copies of what are alleged to have been pre-existing structures. The testimony produced on the part of the defendants is either defective or insufficient as given, or else is successfully rebutted by the plaintiff, either directly, or by showing, from the knowledge of persons in the trade, that it is impossible that the claimed prior structures should have existed. The double-band cap and the turn-over single-band cap are the only caps, the prior existence of which is successfully proved, and they do not meet the plaintiff's patent. The claims of that patent contain patentable inventions.

Sundry objections to testimony, made by the plaintiff on the record, are insisted on and must be passed upon. The evidence of Elias Rosenswig as to prior use in Baltimore is ruled out, because such use is not set up in the answer. None of the other objections are sustained.

There must be the usual decree for the plaintiff.

BARGE No. 6.*

(District Court, E. D. Pennsylvania. March 29, 1881.)

I. ADMIRALTY—SALE OF BOAT—BILL OF SALE—EXECUTION OF BY ILLITERATE MAN UNDER MISAPPREHENSION AS TO ITS CONTENTS—FRAUD.

A bill of sale of a boat was executed, but not acknowledged. The vendor testified that he was an illiterate man; that the bill of sale had not been read to him, but that he had signed it supposing it to contain an agreement for a pledge of the boat, the terms of which had been previously arranged between the parties. The vendee, on the other hand, testified that the vendor had agreed to sell the boat; that the bill of sale had been drawn up in accordance with that agreement, and had been read to the vendor before signing. *Held*, as a matter of fact, (upon a review of the collateral evidence tending to corroborate or contradict these respective allegations,) that imposition had been practiced in obtaining the vendor's signature to the bill of sale.

In Admiralty. Libel for Possession.

The evidence disclosed the following facts: In February, 1878, Patrick Hogan, the libellant, who was then the owner of the barge in controversy, chartered her, to be manned by himself, to one William Holeman. While employed under this charter the boat was, during a temporary absence of Hogan, and while manned by a person appointed by Holeman, sunk at the wharf. She was raised and repaired at a cost of about \$400. Hogan being unable to pay for the repairs they were paid for by Holeman, and at the same time Hogan executed to him a bill of sale of the boat, the consideration named therein being the sum of \$500. This bill of sale was duly witnessed but not acknowledged. After its execution the barge continued to be used in the service of Holeman and manned by Hogan, who, however, received but \$10 per week. In September, 1880, a dispute arose between the parties, Hogan claiming the ownership of the boat and refusing to quit her. Upon Holeman's complaint Hogan was thereupon arrested for stealing the boat, but was discharged on *habeas corpus*. During Hogan's imprisonment Holeman

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

had taken possession of the boat, and upon Hogan's release the latter filed the present libel. Libellant alleged that at the time of the sinking of the boat there had been some controversy as to who should pay for the repairs, which had been settled by an agreement that Holeman should pay them, but should re-imburse himself by retaining from the sum agreed to be paid to Hogan for her use \$15 per week, until the amount of the bill was repaid, and should in the meanwhile hold the title to the boat as collateral security; that libellant was an illiterate man; that the bill of sale had not been read to him, but that he supposed it contained the agreement previously made; and that the amount of the repairs had now been fully repaid to Holeman by the retention of the weekly sums stipulated for. Respondent, on the other hand, alleged that Hogan, being unable to pay for the repairs, and fearing a forced sale of the boat, requested a loan of the money from Holeman, and, on this being refused, agreed to sell the boat to Holeman for \$500—out of which \$400 was to be paid for the repairs and \$100 to Hogan; that the bill of sale was thereupon executed by Hogan, after having been read to him, and that the \$100 was subsequently paid; that Holeman continued to employ Hogan at a salary of \$10 per week until September, 1880, when he was discharged. The subscribing witnesses were called, but testified that the paper was not read in their presence, nor did they know its contents. There was no direct testimony as to the agreement of the parties, on the execution of the bill of sale, other than that of the parties themselves, but various collateral evidence was offered for the purpose of contradicting or corroborating the respective allegations.

A. C. Selden and Curtis Tilton, for libellant.

Walter G. Smith and Francis Rawle, for respondent.

BUTLER, D. J. Respondent exhibits a bill of sale from libellant, and claims title to the boat under it. Libellant says his signature to the paper was obtained through fraud; that he is illiterate, unable to read writing, and the paper was not read to him; that he and respondent had a contract

for hiring, (of himself and the boat,) and he understood the paper as relating to this.

The allegation of fraud must be proved. The libellant is presumed, (in the absence of evidence to the contrary,) to have known the contents of the paper, when signing. The burden of proof is, therefore, on him.

Some weeks preceding the date of the paper, the respondent had contracted with the libellant for his services, and the use of his boat. The libellant entered upon the service, and a few days after, (he being detained at home by the condition of his family,) respondent took possession of the boat, and by improper loading, sunk and damaged it. Repairs being thus rendered necessary, the boat was taken to Mr. Tilton's yard, and a bill for \$400 contracted. What proportion of this was for repairs rendered necessary by the accident, and what by reason of the boat's previous condition, is not clear; but I have no doubt much the smaller part is referable to the former cause. The boat appears to have been in fair condition for the use being made of it before the accident, but after this occurrence libellant resolved to strengthen and improve it. Thus far the statements of the parties do not materially differ,—(saving as relates to the *extent* of the injury sustained by sinking.) Here, however, they separate. The libellant, says the respondent, in consideration of having injured the boat, became surety for the repairs resolved upon, and contracted for the service of himself and the boat, at \$25 per week, \$15 of which were to be retained weekly, until the bill for repairs should be paid; that when he signed the bill of sale, and the other paper accompanying it, he understood them to express this agreement, neither being read to him, and that he knew no better until respondent exhibited and read them in answer to his demand for settlement, when a claim to the boat was first set up; that on completion of the repairs he continued in respondent's employment, as before he had been, for a period of over six months, and then, believing respondent had been paid by the weekly retention of \$15, under the contract, he demanded a settlement; whereupon the respondent

became angry, claimed possession of the boat, ordered him away, and directly after, under pretence that he had stolen the boat, (which was taken with him,) had him arrested, and took the boat. The respondent, on the other hand, denies becoming security for the repairs, or hiring the libellant and boat, after the accident; saying that when the repairs were about being completed, the libellant, fearing his boat would be sold on account of them, solicited him to purchase it, and that after some hesitation he did so, for \$500,—paying Mr. Tilton \$400, less a discount of \$25, for cash,—and \$100 to libellant's wife, at his request, and took the bill of sale, and accompanying paper, (which he read to the libellant before signing,) as evidence of the transaction.

Which of these conflicting statements is true? That of the libellant is corroborated, and the other contradicted, by Mr. Tilton, to the extent that he heard the parties talking when at his place, about \$24 or \$25 per week for the use of the vessel, and says respondent was surety for the repairs. It is also corroborated by the respondent's failure to produce receipts or book-entries, for payment of anything on account of the alleged purchase, to the libellant or his wife; and the testimony of the wife that no such payment was made to her, as respondent states. The subscribing witnesses to the bill of sale and accompanying paper, say neither was read in their presence; that they did not know the contents of either, and did not hear a sale spoken of at the time, nor at any time. Neither Mr. Tilton, who repaired the boat, and saw a good deal of respondent in connection with it, nor any other witness called, ever heard either of the parties refer to a sale or transfer of the boat,—so far as appears. On completion of the repairs libellant resumed possession of the boat and employed it, precisely as he had done before, furnishing all necessary supplies, (except chains, anchors, etc., procured at the time of repairing,) and any third person would certainly have believed, from appearances, that he continued to be the owner, and have been justified in dealing with him as such. On the other hand the respondent is not corroborated in any

respect, (if we omit the bill of sale and accompanying paper,) and while his conduct may possibly have been honest and fair, appearances are against him. The circumstances under which he claims to have purchased the boat are calculated to excite suspicion. The situation of the libellant, an illiterate man, in necessitous circumstances, in the respondent's employment; seriously embarrassed by the injury to his boat; the inadequacy of the alleged consideration; the resort to unfairness, in arresting the libellant on a charge of larceny, to obtain possession, are circumstances which cannot be overlooked in considering the claim which the respondent sets up. His acknowledged offer of \$50 to "get rid" of the libellant and obtain possession of the boat, just before making the charge of larceny, is not consistent with his claim; and his statement that if the repairs had been found to cost \$500, he would have paid libellant \$100, notwithstanding the contract did not require it, does not tend to inspire confidence in his candor. In short, while the libellant's statement seems consistent and probable, in itself, and is corroborated in important particulars, that of the respondent seems inconsistent and improbable, and is wholly without corroboration,—aside from the papers referred to.

I find, therefore, as matter of fact, that imposition was practiced in obtaining the libellant's signature to the bill of sale and accompanying paper, and that the contract between the parties was simply for the services of the libellant and his boat, on the terms he has stated.

If the contract amounted to a *pledge* of the boat for the sum advanced, (and it probably did,) the evidence, I think, justifies a belief that respondent has been paid by the money retained.

A decree will, for these reasons, be entered in favor of the libellant.

FIRST NATIONAL BANK OF YOUNGSTOWN v. HUGHES and
another.

(Circuit Court, N. D. Ohio. ———, 1881.)

1. NATIONAL BANKS—TAXATION OF DEPOSITS—DISCLOSURE OF DEPOSITORS.

A national bank may be compelled to disclose the names of its depositors, and the amounts of their deposits under the compulsory process of a state court in order to ascertain whether any money deposited therein, subject to taxation within the county, has not been duly returned for that purpose by the owners.

2. SAME—INJUNCTION.

A federal court cannot, in such case, stay the proceedings in the state court by writ of injunction.—[Ed.]

In Equity. Demurrer and Motion to Dissolve Injunction.
Sidney Strong, A. W. Jones, and T. W. Sanderson, of
Youngstown, Ohio, for complainant.

Monroe W. Johnson, of Youngstown, and *W. C. McFarland*,
of Cleveland, for defendants.

BAXTER, C. J. The complainant is a national bank, organized under the act of congress, and has its place of business in Youngstown, Mahoning county, Ohio. It complains of James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, of said county, and charges that previous to and on the second Monday of April, 1880, it was, and has ever since been, engaged in the business of banking, authorized by law, and that it then had and has continued to have not less than \$400,000 of deposits, which it employed in its business, and from which it derived profit. Protesting that "it is not subject to any visitatorial powers other than such as are authorized by said act of congress or vested in the courts of the country," it proceeds to complain "that the said James B. Hughes, auditor of Mahoning county, pretending to act by authority of section 2782, Revised Statutes of Ohio, did, on or about the twenty-second day of June, 1880, issue and cause to be served upon William H. Baldwin, the cashier of your orator, a written order commanding the said Baldwin, as such cashier, to appear before said auditor on the twenty-

v.6,no.8—47

second of June, 1880, and give testimony under said section 2782, and to bring with him the books of account of your orator showing the amount of deposits in your orator's bank on the day preceding the second Monday of April, 1880, and the names of its depositors, and the amounts deposited by each; that in obedience to said order Robert McCurdy, your orator's president, did appear before said auditor as commanded, and submitted himself as a witness to testify, but did not produce before said auditor said books of account, or any of them, and, under advice of counsel, refused to produce the same; that thereupon the said James B. Hughes, though not objecting, but assenting, to the appearance and offer to testify of said Robert McCurdy in place of said William H. Baldwin, cashier as aforesaid, advised and encouraged thereto, and aided by the said Monroe W. Johnson, prosecuting attorney for said Mahoning county, and pretending to act by authority of section 2783, Revised Statutes of Ohio, did, on the twenty-fifth day of June, 1880, apply to the probate judge of said Mahoning county to issue a subpoena for the appearance of the said William H. Baldwin, as cashier as aforesaid, before said probate judge, and to bring with him said books of account of your orator," and "that in compliance with the application of said auditor the said probate judge did, on said last-named day, issue and cause to be served upon said William H. Baldwin, as cashier of your orator, his subpoena, commanding said Baldwin to appear before him to testify, and to bring your orator's books of account showing the amount of deposits in your orator's bank on the day preceding the second Monday of April, 1880, and the names of its depositors, and the amount deposited by each; that the said William H. Baldwin is now, as such cashier, under said subpoena, commanded to appear before said probate judge, and there to produce said books of account of your orator, and the said James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, threaten that they will, and they are about to, insist before said probate judge that the said William H. Baldwin shall testify, under oath, as to the amount of deposits in said bank on said day,

the names of depositors, and the amounts deposited by each, and shall produce your orator's said books of account for the inspection of said auditor and said probate judge, and also threaten that upon the failure of said William H. Baldwin so to testify and produce said books of account, they will apply to said probate judge to adjudge said William H. Baldwin in contempt of the probate court, and to punish him for the same, and, unless restrained, the said James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, will, by the order of said probate court, and under its penalties for contempt, compel the said William H. Baldwin to produce your orator's books of account for such inspection."

Complainant avers that "none of said acts done, or threatened to be done," by defendants, "and none of the proceedings had by said probate judge, are in anywise authorized by said act of congress, or by any act of congress, and that the production of your orator's books of account before either said auditor or said probate judge is not authorized by either of said sections of the Revised Statutes of Ohio, or any of the laws of said state; and that all of said acts are prohibited by section 5241 of the Revised Statutes of the United States, and that the necessary result of said acts so as aforesaid threatened and about to be done, will be, by unlawfully exposing your orator's business affairs, to lessen public confidence in it as a depository of money, and to diminish its deposits, and greatly impair the value of the franchise with which it is invested."

Upon the allegations, duly verified by the oath of its president, the complainant prayed for an injunction to restrain the defendants James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, "from any further proceedings or attempts to inspect or have produced, before said auditor or said probate judge, any of the books of account or papers of your orator, and from any and all proceedings or attempts to compel the said William H. Baldwin, cashier of your orator, or any other of your orator's officers or servants having knowledge of its business affairs, to testify as to the deposit accounts or other accounts of your orator."

A preliminary injunction was granted. Defendants now appear and demur, and move to dissolve the injunction.

The auditor was, as we understand the case stated by the complainant, proceeding under and in exact accordance with sections 2782 and 2783 of the Revised Statutes of Ohio. These sections charge him with the duty of making correct tax duplicates of personal property taxable under the laws of the state; and, to enable him to discharge the responsible and delicate trust thus imposed on him, he is authorized and commanded, in case he has reason to believe, or shall be informed, that any person liable to such tax has made a false return to the assessor, to proceed to correct such return and charge the delinquent on the duplicate with the true amount for which he is liable; and to this end he is authorized to issue compulsory process, require the attendance of witnesses, and examine them on oath. But if any person so summoned shall neglect or refuse to attend, or, appearing, refuse to answer any lawful question propounded to him, the auditor is commanded to apply to the probate judge of the county to issue a subpoena for such contumacious witness to appear and give evidence before said probate judge; and in the event any person or persons so summoned by the probate judge shall fail to appear, or, appearing, shall refuse to give testimony, he shall be subject to like proceedings for contempt as defaulting witnesses duly summoned in actions pending in said probate court.

The complainant insists—*First*, that it is protected from the proposed investigation by section 5241 of the United States Revised Statutes. This section provides that no association (meaning national banking associations) shall be subject to any *visitorial powers* other than such as are authorized by this title (63) or are vested in the courts of the country.

But do the defendants, or either of them, propose the exercise of visitorial authority? We think not. Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean "inspection;

superintendence; direction; regulation." The exercise of no such authority is contemplated by defendants. They do not contemplate inspection, supervision, or regulation of complainant's business, or an enforcement of its laws or regulations. On the contrary, their purpose is to ascertain, in a legal way, and by legitimate testimony, whether any person had, at the time mentioned, on deposit with complainant any money subject to taxation in said county which had not been returned by the owners thereof for that purpose. Hence, the subpoena commanding the production of the complainant's books, in the manner and for the purpose stated, is not an exercise of "visitorial powers;" and it follows that the witness is not protected by said section from amenability to the probate court for his contempt in disobeying its mandate.

But complainant insists, *secondly*, that the proposed enforced exhibition of its books will expose its business, lessen public confidence, diminish its deposits and consequent profits, and impair the value of the franchise. We fail to see any sufficient reason for such grave apprehensions. But if complainant's fears were well founded, the state might still be entitled to the testimony demanded. Private rights must to a reasonable extent yield to the public necessities. It is on this ground that a witness possessing knowledge of facts material to the vindication of the rights of another may be compelled by judicial process to appear and give evidence in behalf of that other party, notwithstanding the evidence thus coerced may uncover the witness' private business and subject him to a civil action for damages. Such a witness thus duly summoned is even bound to make extraordinary efforts to attend. *People v. Davis*, 15 Wend. 602. For like reasons, and upon the same principles, persons in possession of written evidence, of whatsoever character, may be required to produce the same to be used as evidence; and it is no ground for the refusal of a witness to produce books or papers, when required by lawful authority, that they are private. *Burnham v. Morrissey*, 14 Gray, 226. Now if the courts are thus careful to assist private persons in procuring evidence for

the maintenance of their individual rights, why should the same power not be exerted in behalf of the public? Is the state, which represents the body politic, entitled to less consideration than its humblest citizen? No state can maintain its existence without revenue—a burden imposed by law on every one for the benefit of all. This burden ought to be equal and uniform, and the legislature requires the officers charged with the duty of making assessments for the purpose of taxation to enforce this just and beneficent rule. And among other powers conferred to enable them to do so, auditors are authorized to summon witnesses and examine them on oath. These enactments are reasonable, necessary, and just. The auditors, selected for their supposed intelligence and impartiality, act officially in the execution of these laws, and it is the duty of every citizen, when summoned, to respond and freely communicate all the information he may possess necessary to a full and impartial assessment of property for taxation.

But it is not incumbent on us to define the duty of the witness in the premises. When he refused to obey the auditor's subpoena, jurisdiction of the controversy—on the auditor's application to the probate judge to issue his subpoena commanding the witness to appear and give evidence before him—passed to and vested in the probate court, and hence, if the witness has any valid and sufficient excuse for his alleged contumacy, he must present and insist upon it before that tribunal. But the complainant replies for the witness, that, while the probate court has jurisdiction generally of controversies of this character, it has not such jurisdiction in cases in which national banks are parties, because, as it contends, the proceeding contemplated is in violation of their chartered rights. This objection has been disposed of. But if we concede complainant's claim of exemption, etc., the responsibility of deciding the question is with the probate court, and not with us.

The plain meaning of the bill, however, is that the probate court will make an erroneous decision. Possibly it may. All courts are liable to err. But the possibility that it may err

imparts to this court no authority to supervise its action. There are cases which, at the instance of a party, may be transferred from a state to a federal court, but this is not one of them. If it were, no attempt has been made to bring it here. The probate court still retains its jurisdiction of the case, and we cannot stay its action or encroach upon its authority without violating a positive act of congress: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. St. § 720. And the supreme court, in the very last case before it involving an interpretation of this statute, says: "Except where otherwise provided by the bankrupt law, the courts of the United States are expressly prohibited, by section 720 of the Revised Statutes, from granting a writ of injunction to stay proceedings in a state court." *Harris v. Carpenter*, 91 U. S. 254.

We must, therefore, remit complainant to the probate court for such action as that court may, after due consideration, feel bound to take. The injunction will be dissolved. Defendants' demurrer will be sustained, and complainant's bill dismissed with costs.

MACKAYE v. MALLORY and another.

(*Circuit Court, S. D. New York.* ———, 1881.)

1. REMOVAL—JURISDICTION—PETITION.

Where a complaint filed in a state court, and a petition for the removal of the cause, raised an issue as to the necessary parties to the controversy, upon which the right of removal depended, *held*, upon motion to remand before trial in the federal court, that the allegations of the petition must prevail.—[Ed.]

In Equity. Motion to Remand.

F. N. Bangs, for plaintiff.

James C. Carter, for defendants.

BLATCHFORD, C. J. This suit was brought in the court of common pleas for the city and county of New York. The complaint therein sets forth in substance that in July, 1879, the plaintiff and the defendant Marshall H. Mallory made a written contract, under which the former was to devote himself to the service of the latter as author, manager, actor, director, or in any other capacity having any connection with theatrical labor; and the entire product of his labor and skill, and all copyrights and patents therefor, and all income therefrom, or from any play or invention of the former, and from the use of any of the services of the former anywhere in any such capacity, were to be the exclusive property of the latter; and such copyrights and patents and income were to be assigned and paid to the latter; and the former made certain covenants to secure said results; and the latter agreed to pay to the former an annual salary of \$5,000, in equal monthly instalments, and also agreed that if the profits of the enterprises in which the services of the former should be employed by him should be equal to twice the amount of money, with interest, expended by him thereon, or if the amount so expended should be less than \$30,000, when such profits should equal the amount so expended by him, with interest, and \$30,000 in addition, then such annual salary should be increased by a sum equal to one-fourth of the net profits produced in each year thereafter from said enterprises; such agreement to continue for 10 years, with provisions for a renewal of it or for a termination of it at the end of any year, at the option of the latter, and for certain benefits to the former, under certain circumstances, on such termination; that the plaintiff has fully performed said contract; that he assigned to M. H. Mallory the copyright of a play called "Hazel Kirke," of which he was the author, and the exclusive right to a mechanical device, of which he was the inventor, called the "double stage," secured to him by letters patent of the United States; that said copyright and patent were of large value; that M. H. Mallory invested money in fitting up a theater in New York, and in equipping a second company to present said play elsewhere, and in purchasing theatrical

properties, which still exist and have a money value; that the said play and "double stage" have been used by M. H. Mallory in New York, in connection with each other, over 300 consecutive times, and said play has been performed elsewhere over 100 times, and therefrom M. H. Mallory and the defendants have received large sums of money, out of which the current expenses of the performances have been paid, the receipts largely exceeding the expenses, and they have in their possession, as owners, property representing their investment of the value of over \$80,000, and they have realized in money more than \$80,000 over all current expenses; that it was the duty of M. H. Mallory and the defendants, under said contract, to keep accounts of all moneys invested or expended thereunder, and of all moneys received from business transacted thereunder, and give to the plaintiff transcripts thereof, or permit him to inspect them; that in May, 1880, said agreement was modified so that thereafter the salary of the plaintiff was to be \$150 per week, and so that he should have 5 per cent. per month and 5 per cent. per annum of all profits above current expenses, instead of the 25 per cent.; that in July, 1880, and since, the plaintiff has applied to the defendants for an account of the receipts and expenditures of moneys under said agreement, but they have refused to render him any account save two scraps of paper, which are set out; that said scraps, as statements of account, are false, crediting to the defendants moneys not expended; that in keeping their accounts the defendants have omitted to set down as profits or earnings certain items named, which ought to be taken in account in determining the results and profits of the business; that since December 8, 1880, the defendants have refused to pay to the plaintiff a salary of more than \$100 a week; that they have neglected to perform said agreement in other matters set forth, and have given themselves an erroneous specified credit; that sometime after the making of said contract, and during the happening of the matters above stated, the defendant G. S. Mallory obtained from M. H. Mallory an interest in said contract, and in the property and assets which had been accumulated by said M. H. Mal-

lory under the operation of said agreement, and G. S. Mallory now has or claims such interest adverse to the plaintiff; that said play and said patent have no established market value, and it would be difficult, if not impossible, to estimate in money the plaintiff's loss by M. H. Mallory having assigned said copyright and said patent, and that any compensation or indemnity to him for the breach of said contract would be inadequate which did not involve the restoration to him of said copyright and said patent, and that the plaintiff elects to treat said contract as rescinded and no longer obligatory upon him.

The complaint prays for judgment—(1) That the contract has been rescinded and is no longer obligatory upon the plaintiff, and that he be restored to all he has lost thereby; (2) that said copyright and said patent be re-assigned to him, or, if that is impracticable, that the defendants pay the value thereof to him, or such value be accounted for as profits realized under said agreement; (3) that an account of said profits be taken, and the plaintiff recover his lawful proportionate share thereof; (4) that the defendants be enjoined from exhibiting said play or assigning said copyright; (5) that they be enjoined from using said mechanical device or invention; (6) that a receiver be appointed of said play and invention and patent.

Both of the defendants appeared by attorney on January 13, 1881. On the twenty-second of January, 1881, before any answer was put in by either defendant, M. H. Mallory presented to the state court a petition, setting forth that the plaintiff was, at the time of bringing the suit, and still is, a citizen of New York, and the petitioner was, at the time of the bringing of this suit, and still is, a citizen of Connecticut, and G. S. Mallory was, at the time of the bringing of the suit, and still is, a citizen of New York; that the suit is one "in which there is a controversy which is wholly between citizens of different states,—to-wit, the plaintiff, a citizen of New York, and this petitioner, a citizen of the state of Connecticut,—and which can be fully determined as between them, and in which controversy this petitioner is actually

interested, and in which he is the only defendant actually interested; that, so far as it relates to him, the said suit is brought for the purpose of restraining and enjoining him, and is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendant as a party in the cause; that said action or suit is brought by the plaintiff therein to obtain an adjudication that a contract made between plaintiff and this petitioner has been rescinded, and a reconveyance to the plaintiff of a certain play known as 'Hazel Kirke,' and of a certain invention, which said play and invention had been assigned to this defendant by the plaintiff by and in pursuance of said contract, and for an account of profits under said contract, and for an injunction restraining this defendant from performing or exhibiting said play or using the said invention, and for a receiver of said play and invention; that the defendant George S. Mallory, as appears from the complaint in said action, is made a defendant therein by reason of his having obtained from this petitioner an interest in said contract, and in property and assets which had been accumulated by this petitioner under the operation of said contract, and by reason of his having or claiming such interest adverse to the plaintiff; but this petitioner says that said allegations of said complaint respecting said George S. Mallory are wholly untrue, and that said George S. Mallory has not, and never has had, any interest in said contract, or in said property or assets so alleged to have been accumulated, and has never received any of the profits arising from the enterprises mentioned in said contract;" and that the petitioner "desires to remove the said suit, or to remove the same as against your petitioner, into the circuit court of the United States for the southern district of New York."

On this petition, and a bond, the defendant M. H. Mallory moved in the state court, on notice to the plaintiff, that the court accept said petition, bond, and surety, and proceed no further in the action, or no further therein against him. The motion was opposed by the plaintiff, and the court denied it, and ordered "that the court do proceed in the action." In

assigning the reasons for its action, the court (*Daly, J.*) held that it was its duty to examine the right of removal; that, as the right of removal depended on the nature of the controversy, such right must be determined by an inspection of the complaint, as the only pleading then before the court; that the petition for removal was not a pleading, and could not vary the cause of action stated in the complaint; that the defendant could not use his petition as a pleading to raise an issue with the plaintiff on the allegations of the complaint, and show a controversy entitling him to remove the cause; that the denial in the petition as to George S. Mallory did not show the controversy to be one wholly between the petitioner and the plaintiff; that if the complaint states a cause of action which can be determined only when all the parties to the action are before the court, a denial by one of the defendants of the facts set forth in the complaint does not sever the controversy as to him, nor show that the cause may proceed as against himself without the presence of the other defendant; that an injunction is not the sole object of the action as respects M. H. Mallory, as required by subdivision 2 of section 639 of the Revised Statutes of the United States; that, under that subdivision, there cannot be a final determination of the controversy, so far as concerns him, without the presence of G. S. Mallory as a defendant, under the allegations in the complaint; and that under section 2 of the act of March 3, 1875, (18 St. at Large, 470,) there is not a controversy which is wholly between the plaintiff and M. H. Mallory, and which can be fully determined as between them, for the reason that, on the complaint, the plaintiff has no controversy with M. H. Mallory separate from G. S. Mallory.

There has been filed in this court, on the part of one or both of the defendants, a copy, certified by the clerk of the state court, of the record of that court. The plaintiff now moves in this court to remand the cause to the state court. The motion is opposed by counsel for M. H. Mallory. It is contended by him that the question of the existence of the facts on which the right of removal depends is an issuable

question, which can be determined only in this court, and cannot be finally determined here on this motion, but only on a regular trial hereafter; that, for the purposes of a removal, nothing can be permitted to contravene the allegations of the petition in the particulars in which those allegations deny the allegations of the complaint as to the interest of George S. Mallory, or in the particulars in which a case within the removal statutes is affirmatively stated in the petition; and that, as the petition states that the suit is brought for the purpose of restraining or enjoining M. H. Mallory, that is sufficient under said section 639, although the complaint asks an injunction against G. S. Mallory also. The principal contention on the part of the defendant is that, in this case, the question whether the controversy between the plaintiff and M. H. Mallory can be determined fully and finally as between them, without the presence of G. S. Mallory, can be decided only on the final trial in this court on all the evidence to be taken; that as, on the allegations of the petition, the controversy may be one which, so far as concerns M. H. Mallory, can be determined without the presence of G. S. Mallory, the case must be retained by this court until it shall finally decide that matter; that this court cannot grant this motion unless it can certainly see now that G. S. Mallory has such an interest that it is clear the controversy, as between the plaintiff and M. H. Mallory, cannot be determined without the presence of the other defendant; and that, in respect to the inconsistency between the allegations of the complaint and those of the petition, the latter must control, or else the case can never reach that stage where the matter can be definitely determined by this court.

Succinctly stated, the view urged is, that where the removal depends on the nature of the controversy, in respect to the necessary parties to it, the nature of the controversy is not dependent on the shape which the plaintiff gives to the controversy when it is developed by the proofs; that when the petition for the removal avers the existence of such a

controversy as would, if the allegation were true, authorize a removal, and the petition admits nothing stated in the complaint, and takes notice of nothing in it except to controvert it, the state court must cease from its jurisdiction; and that, where there is a conflict between the complaint and the petition, the petition alone must be regarded. In support of these views it is suggested, that, when the case is fully developed by the proofs, it may turn out that there is in it a controversy between the plaintiff and M. H. Mallory to which G. S. Mallory is not and never was a proper party; that such a state of facts will show that M. H. Mallory, at the time he presented his petition for removal, had a right to remove the suit; and that, if not now allowed to remove it, his formal proceedings being regular, it will then appear that he has been deprived of a right.

In *Dennistoun v. Draper*, 5 Blatchf. 336, it was held by this court that where the defendant had taken proceedings, under section 3 of the act of March 2, 1833, (4 St. at Large, 633,) to remove into this court a suit brought in a state court, the removal was imperative, if the proceedings were in conformity with the act; that the question whether the defendant had in fact a right to remove the suit could not be raised by a motion to this court, before the trial, to remand the cause to the state court; and that any question as to the jurisdiction of this court in the premises, based on the point of an alleged absence of right in the defendant to remove the suit, could be raised at the trial.

That was an action of replevin brought in the state court to recover the possession of cotton. The defendant removed the case, under the act of 1833, by *certiorari*, claiming that he was in possession of the cotton as an officer, under the revenue laws of the United States. The plaintiff moved to remand the cause on affidavits alleging that the defendant was simply a tort-feasor. The motion was denied, on the view that it was not proper, if it was competent, for this court to determine, upon motion, the disputed jurisdictional facts involving the right or legality of the removal, and that

the proper place to hear and determine them was on the trial. The same view was held by Mr. Justice Nelson in *Fisk v. Union Pacific R. Co.* 8 Blatchf. 243.

Those cases were prior to the enactment of section 5 of the act of March 3, 1875, (18 St. at Large, 472,) which provides that if, in any suit removed, it shall appear to the satisfaction of the circuit court, at any time after such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, the circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require. Under this provision there is no doubt of the power of this court to remand a cause at any time before a formal trial of the plenary issues in it, whenever it appears that the court has no jurisdiction of the suit. In fact, the statute is imperative that, whenever such want of jurisdiction appears, the court shall dismiss or remand the suit. But the provisions do not require the court to remand the suit unless it appears that the suit does not involve a controversy properly within its jurisdiction. If the suit appears on the removal papers and the prior record, taken together, to be a suit properly removable, it is not to be remanded if the question arises solely on those papers, as it does in this case. This view does not affect cases like *Galvin v. Boutwell*, 9 Blatchf. 470, and *Heath v. Austin*, 12 Blatchf. 420, where, even before the act of 1875, the question of citizenship was tried on affidavits in this court on a motion to remand. The same thing was done after the act of 1875 in *Sawyer v. Switzerland Marine Ins. Co.* 14 Blatchf. 451.

It is the practice of the courts of the United States, under the act of 1875, to try the question of jurisdiction on a motion to remand, and before the plenary trial. In *Gold Washing Co. v. Keyes*, 96 U. S. 199, the circuit court did this and remanded the cause, and the supreme court, on a writ of error taken under section 5 of the act of 1875, affirmed the judgment of remand, on the ground that, on the pleadings in

the state court and the petition for removal, taken together, the jurisdiction of the circuit court did not appear. The same course was taken in *Bible Society v. Grove*, 101 U. S. 610, and in *Jifkins v. Sweetzer*, 1 Morrison's Transcript, 109. The question of jurisdiction was not left to be tried at the formal trial of issues raised by the pleadings. The question to be determined on this motion is whether the record before this court shows jurisdiction or a want of jurisdiction.

In *Gold Washing Co. v. Keyes*, above cited, it is said: "For the purposes of the transfer of a cause, the petition of removal, which the statute requires, performs the office of pleading. Upon its statements, in connection with the other parts of the record, the court must act in declaring the law upon the question it presents." Again: "The record in the state court, which includes the petition for removal, should be in such a condition when the removal takes place as to show jurisdiction in the court to which it goes. If it is not, and the omission is not afterwards supplied, the suit must be remanded." Certainly the petition in this case shows a remarkable case under the act of 1875, because it avers that the allegations of the complaint respecting G. S. Mallory are untrue, and that he has not and never has had any interest in the subject-matter of the suit. Even taking into view the complaint with the petition, it does not appear that this court has not jurisdiction of the suit. For the purposes of a removal, the allegations of the removing party in the petition must, at this stage of the case, prevail, and the suit must, for the present, be retained in this court.

SHAINWALD, Assignee, etc., v. LEWIS.

(District Court, D. California. November 11, 1880.)

1. FRAUD—CONSPIRACY—COLLUSIVE JUDGMENT—FICTITIOUS INDEBTEDNESS—FABRICATED ANTEDATED NOTES.

Where members of an insolvent firm, with intent to defraud firm creditors, conspired with a person to whom the firm was indebted in only a small amount to have an attachment levied on the firm property, and a judgment to be taken upon fictitious and ante-dated firm notes fabricated for the purpose, and to transfer to him all the firm property then *in transitu*, and for which the firm held bills of lading; and, in pursuance of such conspiracy, judgment was recovered, the firm property sold on execution, and bid in by the plaintiff in the collusive suit, and the remaining property of the firm secretly transferred to him, *held*, that he was liable to the assignees in bankruptcy, as representative of the firm creditors, for the value of all of the firm property so fraudulently obtained by him, and will be decreed a trustee of such property, and of its proceeds, for the benefit of the firm creditors represented by the assignee.

In Equity.

James L. Crittenden, for plaintiff.

Henry E. Highton, for respondent.

HOFFMAN, D. J. The complainant seeks by his bill in equity to have a certain judgment, execution, sheriff's sale, and other proceedings in a suit at law in the nineteenth district court of this state, entitled "*Harris Lewis v. Louis H. Schoenfeld, Isaac Newman, and Simon Cohen*," declared to be a fraud upon the creditors of the firm of Schoenfeld, Cohen & Co., and upon the complainant, as their assignee in bankruptcy, upon Simon Cohen, and upon said firm; also, that it be declared and decreed that certain promissory notes upon which the suit was brought, to-wit, a note for \$17,000, a note for \$8,000, and a note for \$5,000, were fraudulent and void as against said firm for want of consideration; also, that it be declared and decreed that certain transfers of money, bills of lading, promissory notes, and other property, to the respondent, by said Schoenfeld and Newman, were fraudulent and void as against the creditors of said firm, upon the complainant as their assignee, and upon Simon Cohen, one of the members thereof; also, that it be declared and decreed

v.6,no.8—48

that the respondent is a trustee for the benefit of the complainant of all the moneys, bills of lading, accounts, merchandise, chattels, and other property obtained by said Lewis through or by means of said action, attachment, judgment, execution, or sheriff's sale, or transferred or delivered to or received by him from said Schoenfeld, from said Newman, or from any other person, and also for such further and other relief, etc.; also, for an injunction and writ of *ne exeat*.

The facts and circumstances which constituted the fraud are particularly and fully set forth in the bill. Its allegations are sustained beyond all doubt or denial by the proofs. It is, perhaps, not easy to imagine a grosser case of conspiracy by merchants of fair repute to cheat and defraud their creditors, or one where the proofs could be more convincing and indisputable. The testimony is very voluminous. But the evidence to establish the fraud is that of seven witnesses only, viz., Lewis, Newman, Hyams, Schoenfeld, Naphtaly, Sharp, and Bremer, nearly all of whom were active participants in the fraud, either at its inception or during its progress or at its consummation.

I shall not attempt to give a detailed account of the various transactions by which the respondent, at the instance and by the aid of Newman and Schoenfeld, two of the three members of the firm, succeeded in getting possession of the entire assets of the partnership, to the exclusion of all its eastern and foreign creditors, and of nearly all its creditors in this state. It will be sufficient to state the nature and effect of the fraudulent conspiracy, and in a general way the means by which those objects were attained. The firm of Schoenfeld, Cohen & Co. was composed of three partners—Louis S. Schoenfeld, Isaac Newman, and Simon Cohen. Its capital was \$30,000, contributed (\$15,000 each) by Schoenfeld and Newman. Cohen was to contribute for a certain period his skill and experience in the business, and thereafter to furnish \$15,000 to the capital, or pay interest on such portion thereof as he should fail to furnish. Each partner was to be at liberty to draw \$250 per month for personal expenses. In January, 1877, it was determined between Schoenfeld and New-

man that the former should proceed to the eastern states and Europe to procure, if possible, a large stock of goods on credit. Aware that their credit would depend upon their financial standing here, and knowing that, if the true condition of their affairs was disclosed, Mr. Schoenfeld's expedition would prove abortive, they presented to one of the banks of this city a false statement of their profits and business affairs, sustained by false entries in their books as to their profits, and the amount of money loaned to the firm by Newman. Having thus firmly established their credit, Schoenfeld proceeded to the eastern states and to Europe, and succeeded in purchasing goods to the amount of more than \$30,000, cost price. Whether, at the time the false credit was obtained, and Mr. Schoenfeld started for Europe to make his purchases, it was the intention of Newman and Schoenfeld to cheat the foreign creditors out of the whole price of any goods the firm might succeed in obtaining by false pretences as to their financial condition, or whether that project was formed after Mr. Schoenfeld's return, does not clearly appear. It is certain, however, that the preliminary steps for the perpetration of the fraud were taken immediately on his arrival. Mr. Schoenfeld returned to this city early in June, 1877. On the succeeding day he met Newman by appointment at their store, where the affairs of the firm were discussed. A subsequent meeting was soon after held, at which Mr. William Bremer, Mr. Hyams, and Mr. Lewis were also present.

For the full understanding of the agreement entered into at this meeting some explanation is necessary. The \$15,000 contributed to the capital of the firm by Schoenfeld had been obtained by him by a loan of \$8,000 from an old friend and former employer, Mr. H. Bremer, for which he had given his individual notes. He had paid in, in cash, \$2,000. The remainder, \$5,000, he had borrowed, on his individual note, from Newman, who claimed that the money belonged to a Mrs. Alexander, by whom it had been placed with him for investment. Newman had paid in cash the whole of the \$15,000 to be contributed by him to the capital. He had also lent the firm on the firm's notes \$18,000. These notes

were then held by the London & San Francisco Bank, having been hypothecated by Newman to secure a private loan of \$6,000. The money had been originally obtained, as Newman asserted, and as appears to be the fact, from the respondent, and there is evidence tending to show that Newman had, without the knowledge of his partners, executed a note in the firm name to Lewis for \$17,000 of the amount. On this point the testimony is conflicting. It is not material; for the note, if executed, was a fraud upon his other partners, and the respondent well knew that the firm note to Newman for the loan was outstanding. It had, in fact, been transferred by Newman to Lewis, and had been by the latter lent to Newman to enable him to deposit it as collateral security for his loan from the bank. At the first meeting nothing definite was effected. At the next meeting Mr. Newman explained the embarrassed condition of the firm. He stated that he owed \$20,000, viz: the \$18,000 already mentioned, and \$2,000 which Lewis had loaned to the firm, and for which he held their genuine note; that Lewis was his only friend in the world, etc., and he insisted that he should be protected. Mr. Schoenfeld replied that if Lewis was to be protected, his confidential creditor should also be secured. This was assented to, and it was agreed that a firm note for \$8,000 should be executed to Bremer, "so that the \$8,000 should stand valid against the firm instead of against an individual member, in case any action should be taken." This was accordingly done on the succeeding day. The note was delivered to Mr. William Bremer, agent for H. Bremer, who was to hold it for presentation as a firm debt in case any suit was brought against the firm. Mr. Bremer did not then, nor at any time up to the trial of this cause, surrender the individual notes of Schoenfeld originally given by the latter to his brother.

A few days subsequently Mr. Schoenfeld received a peremptory notice from the Anglo-California Bank to make good the firm's indebtedness. This notice he communicated to Mr. Newman. A meeting was at once held to make arrangements for the consummation of the fraud which was in con-

templation. It was held in the private office of Lewis, and was attended by Schoenfeld, Newman, Lewis, and Mr. Naphtaly, as legal adviser. Its avowed object was to defraud the firm creditors by placing the entire assets of the firm in Lewis' hands, who was first to satisfy Newman's indebtedness to himself and the firm's indebtedness to him of \$2,000. He was also to pay Schoenfeld's individual indebtedness of \$8,000 to Bremer, and also the balance of his indebtedness of \$4,000 to Newman or Mrs. Alexander. Whatever should remain after making these payments was to be divided between Newman and Schoenfeld. To enable Lewis to attach the property of the firm it was necessary that he should appear to be a firm creditor, and for this purpose a further fabrication of firm notes was required. At Mr. Naphtaly's suggestion, a demand note for \$17,000, antedated as of December 23, 1876, was drawn up and signed by Mr. Schoenfeld in the firm name. Mr. Naphtaly, however, objected to the form of the note, as it appeared on its face to be long overdue. It was, therefore, destroyed, and a new firm note was made, antedated in like manner, but payable six months after date. A note was also made, by Mr. Naphtaly's advice, in favor of Mrs. Alexander for \$4,000. This, too, was antedated. These notes were given to Mr. Naphtaly, with the understanding that an attachment suit should forthwith be commenced upon them—the fabricated firm note given to Bremer, and the genuine firm note for \$2,000 held by Lewis. The note for \$4,000 was returned on the same evening by Mr. Naphtaly, who, on reflection, preferred that the transaction should take the form of an antedated firm guaranty of Schoenfeld's original note, rather than of a newly-fabricated note to Mrs. Alexander. The reason assigned for this preference was, according to Schoenfeld, that when there was a genuine note there was no need of resorting to a fabricated one. The difference either in morals or laws between fabricating the entire instrument and fabricating and antedating a firm guaranty of Schoenfeld's note to Newman, he did not, when examined as a witness, attempt to explain. All these preliminary preparations for carrying into effect the fraudu-

lent designs of the conspirators were made with the full knowledge of the respondent. He acted as their chosen and willing instrument. That the firm was insolvent he was well aware. Mr. Schoenfeld testifies that a few days before Lewis had suggested to him and Mr. Newman "to go ahead with the business if we thought we could run it, and he would give us the money to keep it up for a year or two longer, and we could get in a large credit and then bust up."

The fraudulent designs of the parties, and the complicity of Lewis, are confessed by Mr. Naphtaly himself. He testifies that Newman, Schoenfeld, and Lewis desired this attachment suit to be brought, *and to secure all the property of the firm of Schoenfeld, Cohen & Co., by means of that suit, and they all acted in concert all the time until Lewis and Schoenfeld had the fight in the office.* Naphtaly's Test. Trans. 878-9. Lewis "*knew that he was going to make more than his claim, and he didn't want anything for outsiders.*" Naphtaly's Test. Trans. 881. By this felicitous epithet Mr. Naphtaly designates the whole body of foreign and eastern creditors, whose shipments, arrived and to arrive, it was proposed to appropriate without the payment of a single dollar of the purchase money. The arrangement being thus completed, the \$8,000 firm note in Bremer's hands was obtained from him, and suit was brought in the name of Lewis for \$41,000, and an attachment levied on the stock in trade, on debts and accounts of the firm. No scruple or hesitation seems to have been felt by any of the parties, or their attorney, in making the allegations under oath necessary to institute these proceedings.

The seizure by the sheriff of the stock in trade of the firm rendered it impracticable any longer to preserve the secrecy which, up to that time, had been carefully guarded. The banks and the agent for the foreign creditors became alarmed, and pressing in their demands that the suit should be defended. The chief danger which threatened the success of the plot was the institution of bankruptcy proceedings before a levy under judgment and execution could be made. It was therefore thought that some show or pretence of defending the

suit should be made. The attorney selected by Mr. Naphtaly for this purpose was Mr. W. H. Sharp. It does not appear that at this time Mr. Sharp was informed that the notes on which the suit was brought had been fabricated, and that, with the exception of the \$2,000 note to Lewis, they represented no real indebtedness of the firm. But he did know, or rather he supposed, that a fraud on the bankruptcy act was intended; that the suit was to be an "amicable" one; that no defence was to be made and no obstacle interposed to prevent the plaintiff from obtaining the preference over all the creditors of the firm which the suit was instituted to secure.

The foreign creditors of the firm were represented by Mr. Shainwald. He was very anxious that the suit should be defended, and was distrustful of Schoenfeld's assurances that a defence was intended. This was communicated to Mr. Sharp, who replied, "I know Shainwald; I will speak to him; bring him to me." Mr. Shainwald was soon after brought to Mr. Sharp's office, and told by the latter that the suit would be defended. On this point Mr. Sharp's testimony is as follows: "*Question.* Then you said 'bring him to me?' *Answer.* Yes, sir. *Q.* Then you told Mr. Shainwald that the suit would be defended? *A.* That I was employed, and would defend the suit. *Q.* How could you make such a statement if you were not so employed? *A.* The day before that it was understood that I should put in that demurrer—make that defence. *Q.* A frivolous demurrer for delay? *A.* Yes, sir; that is so. I don't know that I used the word defend; I may have said so. *Q.* What made you tell him so if you were not employed to make any defence, and it was with the understanding, and to your knowledge, an amicable suit, and you were not to obstruct the plaintiff in getting the judgment at the earliest day, in order to defeat the bankrupt act? *A.* The object was to assure Mr. Shainwald that the approaching default would not be allowed to be entered that he was so much concerned about. *Q.* Was that a falsehood? *A.* I was not under any obligation to him, I thought." Sharp's Test. Trans. 987.

With regard to this interview, Mr. Schoenfeld testifies that Mr. Sharp told Shainwald that "it would be quite a while before the suit would come up, and that he could fight it for a long time; and that Shainwald left the office satisfied that he would have ten days, and that he would have enough claims from the east within that time to put the firm into bankruptcy. It was understood privately, however, between Newman and Sharp and myself, that instead of the usual ten days allowed on overruling a demurrer, Sharp should take only three days. Naphtaly told me *he had fixed things with Sharp when he employed him. Mr. Naphtaly employed Sharp for defendants in the Lewis suit, and told me he had an understanding to take judgment in three days after the overruling of the demurrer.*" Schoenfeld's Test. Trans. 613-14. The judgment was taken accordingly.

Mr. Sharp's assurances do not seem to have allayed Mr. Shainwald's apprehensions. He still continued importunate in his demand on Mr. Schoenfeld that he should at once go into voluntary bankruptcy. He had discovered that there were only three days in which to answer. Unable to find any pretext for evading Shainwald's importunities, Schoenfeld applied for advice to Mr. Naphtaly. Schoenfeld testifies that he was told by Mr. Naphtaly to "tell him (Shainwald) that Mr. Sharp had neglected to put in the answer; that it was an oversight of his which he discovered, and came to me not to take advantage of it. For God's sake do not let him get any papers in the United States district court before 10 o'clock in the morning." Trans. 617.

Similar representations with regard to the intended defence of the suit were made to Mr. Belknap, an attorney employed by the banks. Mr. Naphtaly himself admits that he *really intended to deceive Mr. Belknap in regard to the matter, and make him believe that Mr. Sharp was employed to defend the suit.* Trans. 913. The bank, however, was assured that it should receive a *pro rata* share of whatever sum the goods might bring at the sale on execution.

I have entered somewhat minutely into these repulsive details of falsehood and deception, because they were neces-

sary to show beyond dispute or cavil the fraudulent and collusive character of the suit and the sham defence that was made to it. It is, perhaps, hardly necessary to add that Mr. Sharp, the attorney for defendants, sent his bill to and was paid by Lewis, the plaintiff. The arrangement made with the banks for a *pro rata* share of the proceeds of the sale on execution made it for the interests of the conspirators that Lewis should bid them in for the lowest possible price. No effort was spared to accomplish this object. Only the indispensable advertisements were published, and but little opportunity was afforded to the public to ascertain the value and quality of the goods. But a private inventory, with the cost prices attached, was made out and given exclusively to Mr. Lewis. Efforts were made to discourage other parties from bidding, and the contents of the store were sold by the floor, and not in lots, as would have been most advantageous. Mr. Lewis succeeded in becoming the purchaser for a sum insignificant in comparison with the market value of the goods.

It is unnecessary to recount in detail the remaining steps taken to consummate the fraudulent designs of the parties. Enough to say that by various methods Lewis succeeded in obtaining possession of almost the entire assets of the firm, including the bills of lading for the goods purchased abroad by Schoenfeld. Nothing has ever been paid to any of these creditors. Several months having elapsed, Mr. Schoenfeld became impatient for the payment to Mr. Bremer of the \$8,000 promised as his share of the plunder. To this Lewis demurred. A quarrel ensued, and Schoenfeld disclosed the whole affair to Mr. Cohen, who seems to have been up to that time ignorant of its real nature. Legal advice was at once taken, and Mr. Crittenden, solicitor for complainant in the present suit, on behalf of Cohen requested of Mr. Sharp to consent to his substitution as attorney for Cohen, or that Sharp should unite with him in a motion to set aside the judgment. Mr. Sharp declined both propositions, although he was advised by Mr. Crittenden of the nature and origin of the fabricated notes upon which judgment had been recov-

ered, and was informed that Cohen had never been served with process in the suit, and had been kept in ignorance of the proceedings. Mr. Crittenden thereupon determined to move in the nineteenth court that he be substituted as attorney for Cohen, and that the judgment be set aside. The motion was accordingly made on affidavits alleging in substance what has been proved in this cause, and narrated in this opinion. The motion was opposed by Mr. Naphtaly, assisted by Mr. Sharp, who furnished him with an affidavit, and gave him "all the co-operation in his power that the judgment should stand." Mr. Sharp states that his reason, or one of his reasons, for this, was that the rights of other persons were concerned. When asked to whom he referred, he replied that he referred to Mr. Lewis.

The motion to set aside the judgment was denied by the court. The motion to substitute has never been decided. On the twenty-sixth day of April, 1878, a voluntary petition in bankruptcy was filed by Cohen and Schoenfeld, under which the firm was adjudicated bankrupt. Mr. Shainwald was subsequently appointed assignee, and the present suit was commenced.

No comment is necessary upon the facts related in the foregoing narrative. They exhibit as flagrant a case of gross and deliberate fraud upon creditors as can be well imagined. The fraud derives an additional heinousness from the fact that a court of justice was made the instrument of its perpetration by its own officers, whose highest professional duty was to demean themselves uprightly before it, and to scrupulously abstain from all attempts to deceive or impose upon it. The court was not only induced by falsehood and deceit to render judgment for the plaintiff in a collusive suit, brought on fictitious demands, but it was prevented from correcting its error by the strenuous opposition of both the attorneys, supported by their own affidavits. If practices like these are suffered to pass without exposure and rebuke, the legal profession will rapidly decline in public esteem, the authority of the courts will be weakened, and even respect for the law itself, without which free institutions are impossible, will be

gradually, but surely, destroyed. The frauds perpetrated in this case are, therefore, more than a private wrong. They rise to the bad eminence of a public crime.

In fixing the amount of the decree I have sought to ascertain the value of the firm's assets which came into the possession of the respondent. The nature of the inquiry forbade the hope of any very accurate result. I have indicated in a memorandum filed with the decree the various items of which the aggregate sum decreed is composed. To enumerate them here and to give in detail the testimony in regard to them, would greatly increase the length of this opinion, already longer than I could have wished. It will, perhaps, not be thought unreasonably long when it is considered that the testimony in the case covers more than 2,200 written pages. Besides, *non sunt longa ubi nihil est quod demere possis*.

The following decree was entered November 5, 1880:

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

First. That the judgment of the district court of the nineteenth judicial district of the state of California, in and for the city and county of San Francisco, in the action in said court entitled "*H. Lewis, plaintiff, v. Louis S. Schoenfeld, Simon Cohen, and Isaac Newman, defendants*," which was rendered, entered, and recorded on or about the seventeenth day of July, A. D. 1877, being the judgment mentioned and described in the plaintiff's bill in this cause, was procured and obtained by the said Harris Lewis, respondent herein, by fraud and collusion, and was and is a fraud upon and against said Simon Cohen, also upon and against the said firm of Schoenfeld, Cohen & Co., also upon and against the creditors of said firm of Schoenfeld, Cohen & Co., and also upon and against the complainant, the said Herman Schainwald, as assignee in bankruptcy of the firm of Schoenfeld, Cohen & Co., and of Louis S. Schoenfeld, Isaac Newman, and Simon Cohen, bankrupts.

Second. That said judgment of said nineteenth district court of the state of California, and also the entry and record of said judgment, be and the same and each of the same is and are hereby declared, adjudged, and decreed null and void, and of no effect.

Third. That said action in said district court of the nineteenth judicial district of the state of California, the writs of attachment and the writ of execution issued therein, each and every levy and all levies made on or under or by virtue of said writs, or of either of them, the sale under said writ of execution by the sheriff of the city and county of San Francisco, the purchase and purchases made at said sheriff's sale by said Harris

Lewis, respondent herein, the order made and rendered by said district court of the nineteenth judicial district of the state of California denying the application of said Simon Cohen and said Louis S. Schoenfeld for an order vacating and setting aside said judgment, and each, all, and every of the proceedings in said action, was and were commenced, had, done, taken, obtained, and procured by and through fraud and collusion on the part of the said Harris Lewis and of his agents and attorneys, and with the intent, object, purpose, and design of cheating and defrauding the creditors of said firm of Schoenfeld, Cohen & Co., and in pursuance of a secret, illegal, and fraudulent combination, conspiracy, and agreement between said Harris Lewis, Louis S. Schoenfeld, and Isaac Newman to defraud the creditors of said firm; and said action and the aforesaid writs, levies, sales, purchases, and orders, and each, all, and every proceeding and proceedings in said action, is and are hereby declared, adjudged, and decreed to be a fraud upon and against said Simon Cohen, also upon and against the said firm of Schoenfeld, Cohen & Co., also upon and against the creditors of said firm of Schoenfeld, Cohen & Co., and also upon and against the said Herman Shainwald, as assignee in bankruptcy of the firm of Schoenfeld, Cohen & Co., and of Louis S. Schoenfeld, Isaac Newman, and Simon Cohen, bankrupts, and is and are hereby declared, adjudged, and decreed null and void, and of no effect.

Fourth. That the said district court of the nineteenth judicial district of the state of California did not acquire any jurisdiction in said action over said Simon Cohen, and the judgment and writ of execution therein, and all proceedings thereon, were and are, and each and every one of them is, null and void for want of jurisdiction in or on the part of said court over the person of said Simon Cohen.

Fifth. That the \$17,000, \$8,000, and \$5,000 promissory notes mentioned and described in the complainant's bill herein, and upon which said Harris Lewis obtained said judgment in said district court of the nineteenth judicial district of the state of California, were, and each of them was, manufactured and delivered by said Louis S. Schoenfeld and Isaac Newman to said Harris Lewis, and was and were procured and received by and through fraud by and on the part of said Harris Lewis, without any consideration being paid therefor to said firm of Schoenfeld, Cohen & Co., and with the intent, object, and design to cheat and defraud the creditors of said firm, and in execution of the aforesaid combination, conspiracy, and agreement; and the said notes are, and each of them is, hereby declared, adjudged, and decreed to be null and void, and the said Harris Lewis is hereby ordered to deliver and surrender each, all, and every one of said promissory notes to said Herman Shainwald, as assignee as aforesaid, within five days.

Sixth. That all the money and property of the firm of Schoenfeld, Cohen & Co. which was received or obtained possession of by the respondent, Harris Lewis, on or subsequent to the twenty-third day of June, A. D. 1877, by or through any purchase at sheriff's sale or from William H. Bremer, Isaac Newman, Louis S. Schoenfeld, or from any other person, was and were obtained possession of, delivered to, and received by him by and through fraud, and by and through an illegal and fraudulent

combination and conspiracy between said Harris Lewis and the said Isaac Newman, Louis S. Schoenfeld, and other persons, to cheat and defraud the creditors of said firm of Schoenfeld, Cohen & Co.; and the said respondent, Harry Lewis, is hereby declared, adjudged, and decreed to be a trustee for the benefit of the creditors of said firm of Schoenfeld, Cohen & Co., and for the benefit of said Herman Shainwald, as assignee in bankruptcy of said firm, and of the individual members of said firm as aforesaid, of all the money and property of said firm as received, delivered to, or obtained possession of by him, the said Harris Lewis, and also of any and all interest, profit, profits, income, and proceeds made, secured, obtained, or in any way or manner or form realized by him, the said Harris Lewis, by or from, or by means of the use of, said money and property, or any part thereof, or by the use of any such interests, profits, or proceeds; and the said Harris Lewis is hereby declared, adjudged, and decreed to be a trustee of the sum of \$81,425.07, in lawful money of the United States, for the benefit of said Herman Shainwald, as assignee in bankruptcy of the firm of Schoenfeld, Cohen & Co., and of Louis S. Schoenfeld, Isaac Newman, and Simon Cohen, bankrupts, the same being the aggregate amount of the said moneys and property of said firm received and obtained by said respondent as aforesaid by fraud and collusion before the first day of November, A. D. 1877.

Seventh. That the complainant, Herman Shainwald, recover from the respondent, Harris Lewis, and that the respondent, Harris Lewis, forthwith pay to the said Herman Shainwald, the complainant herein, the sum of \$81,425.07, and the further sum of \$17,091.26, interest on the aforesaid sum of \$81,425.07 from the first day of November, A. D. 1877.

Eighth. That the injunction heretofore issued in this suit on the eighteenth day of November, A. D. 1879, be and the same is hereby made and declared to be perpetual.

Ninth. That the complainant, Herman Shainwald, as assignee as aforesaid, recover from the respondent, Harris Lewis, and that the respondent pay to the complainant, all the costs and disbursements by said complainant incurred or paid out in this cause, the same to be taxed by the clerk of this court.

Tenth. That the writ of injunction issued forthwith out of this court commanding the said Harris Lewis, his agents, attorneys, servants, and assigns, to cease, desist, and refrain forever from claiming or asserting any right to said judgment, or to any writ or levy of execution, or to any order, relief, or other proceeding, in the said action in the said district court of the nineteenth judicial district of the state of California, and from prosecuting said action or taking any other or further proceeding therein, and from issuing or procuring to be issued therein any writ or other process, mesne or final, and from doing any other act or thing therein, and from assigning, transferring, or otherwise disposing of said judgment, or any part or portion thereof, and also from asserting or setting up in any way, manner, or form any claim, right, title, interest, or ownership of, in, or to the promissory notes for \$17,000, \$8,000, and \$5,000 hereinabove mentioned, or of, in, or to any or either of them.

SHAINWALD, Assignee, etc., v. LEWIS.

(District Court, D. California. March 30, 1881.)

1. EQUITABLE RELIEF—EXECUTION—INJUNCTION—RECEIVER.

Where a decree in equity is obtained against a defendant for a sum of money, and execution has been returned unsatisfied, a court of equity has jurisdiction of a bill alleging that the defendant has secreted his property, and is disposing of the same with the avowed intent of defrauding the complainant, and depriving him of the fruits of his decree, and praying an injunction and receiver. It is not necessary in such a bill to particularly describe the assets, whether equitable or not, sought to be reached, and a court of equity will issue an injunction, appoint a receiver, and compel an assignment of all the property of the defendant, when such action is necessary to defeat the fraudulent designs of the defendant.

2. SEQUESTRATION.

Quære, whether, upon such a showing to the court by petition in the original suit, a writ of sequestration may not issue.

3. INJUNCTION—CREDITOR'S BILL.

Quære, whether, under such an original decree, and upon the showing above mentioned, the court has not the power to issue an injunction, and make an order for a receiver and assignment, without requiring the complainant to file a so-called creditor's bill, or to wait for the return of an execution unsatisfied.

In Equity. Motion to Revoke Appointment of Receiver.

James L. Crittenden, for plaintiff.

Delos Lake, for respondent.

HOFFMAN, D. J. On the fifth day of November, 1880, a decree was entered in this court against the above-named respondent, by which he was adjudged to have obtained possession of the funds of the bankrupt firm, of which the complainant is assignee, by fraud and collusion, and by means of fraudulent and collusive judgments against the firm founded on fictitious debts. He was, therefore, decreed to be a trustee for the complainant of all such funds, and was required to pay over to the complainant the amount thereof as ascertained by the decree. On this decree an execution was issued and returned unsatisfied. A bill was thereupon filed by the complainant setting forth the previous proceedings in the cause, and averring that respondent had procured a homestead to

be declared upon his land; had sold valuable real estate, and threatens, intends, and is about to leave and depart the United States, and take and carry with him all his money and other property, with the intent, object, purpose, and design of preventing the same from being levied upon or applied in satisfaction of said decree, and with intent to hinder, delay, and defraud this complainant of the moneys and property to which he is entitled under said decree. That since the enrolling of said decree the respondent has secretly transferred a large part of his property to divers persons, and has secreted the remainder of his property with the intent and design aforesaid, and to prevent said property from being seized on execution, or secured or applied to satisfy said decree. That the respondent has stated and declared to divers persons that he had so fixed his property that it could not be seized to satisfy said decree. That the respondent has property, debts, and other equitable interests to the value of \$90,000, exclusive of all just prior claims thereto, which the complainant has been unable to reach by execution. That the action is not commenced by collusion with respondent, or with any other person, for the purpose of protecting the property or effects of the respondent against the claims of other creditors.

The bill contains the usual prayer for an injunction, for a receiver, and for other relief. Upon this bill an injunction was issued and a receiver appointed, and the respondent was ordered to show and make an assignment of all his property and effects. This he at first refused to do, and was committed for contempt. At a subsequent day he executed the assignment, which, by order of the court, remained in the custody of the clerk until the hearing and decision of the present motion to vacate the order appointing a receiver and for the execution of the assignment. That motion has accordingly been made and argued. It is based on the grounds—(1) That the bill of complaint herein does not disclose any equitable ground for the appointment either of a receiver or referee; (2) that, upon the facts disclosed in the affidavits and papers filed herein, the appointment of a receiver or referee is unnecessary. The notice of motion states "that it is based upon

the affidavits of the respondent herein, with copies of which you are herewith served, and upon all and singular the records, papers, files, and proceedings in this suit."

At the hearing of the motion an amended bill was presented and read as an affidavit. It is unnecessary to detail at length its averments. It is sufficient to say that they corroborate the allegations of the bill, and of the affidavits in support of it, and state other facts tending to show the absolute necessity for the immediate appointment of a receiver to prevent the loss to the complainant of the property and assets of the respondent, and of the trust funds invested by him in the goods, wares, and merchandise contained in a certain store in the state of Nevada owned by him.

The amended bill further alleges the institution, in the state of Nevada, of a collusive suit by a pretended creditor of the respondent, founded on a fraudulent and fictitious indebtedness, with intent to have the proceeds of said trust funds in the state of Nevada seized and sold under execution, and with the design of hindering, delaying, and defrauding the complainant.

If these allegations are true, or even partially true, a stronger case for the appointment of a receiver could not well be imagined. Unless this court can interpose in the most summary manner, the complainant will be remediless, and its decree abortive. The motion to set aside the order for the appointment of a receiver is not based on any denial of the facts alleged in the bills and affidavits, of which a summary has been given. It is rested on the denial of the jurisdiction of a court of equity to afford the relief prayed for.

It is contended that the jurisdiction exercised in the courts of chancery in New York, to entertain what the counsel denominates "a fishing creditor's bill," is entirely the creature of the statute of that state; that independently of those statutes equity could only entertain a creditor's bill filed for the purpose of removing fraudulent impediments or obstructions to the service of an execution against real or personal property, or for the purpose of subjecting equitable assets to the operation of the execution, when the same had

been returned unsatisfied, and the legal remedy thereby shown to have been exhausted. But it is contended that in such cases the equitable assets must be described and indicated in the bill, or in a supplemental or amended bill, if afterwards discovered.

It is also contended that the bill in this case must be considered precisely as if founded on an ordinary money judgment at law, and that no notice can be taken of the fact established by the original decree that the demand arose out of a fraud and conspiracy of the grossest kind, and that the respondent has been adjudged a trustee of the funds thus fraudulently obtained and appropriated. All jurisdiction to arrest a fraudulent judgment debtor in the execution of an avowed purpose to transfer, secrete, and make way with his property, in order to defeat the claim of his judgment creditor, is denied, unless the creditor can describe and indicate the secreted property; and, even in that case, (unless the position of counsel is misapprehended,) the property so described must be equitable assets which cannot be reached by an execution at law.

But in this state equitable assets *can* be reached by an execution at law. The aid of equity to reach such assets, when known, would not be required, and the jurisdiction of the court to entertain creditors' bills would be limited, if the position of counsel be correct, to bills of the first class above mentioned, viz.: bills filed to remove obstructions or impediments to an execution.

I think it can be shown that the contention of counsel that the equity jurisdiction exercised by the court of chancery in New York was exclusively derived from the Revised Statutes of that state, is an erroneous view of the origin and foundation of that jurisdiction.

The point was elaborately considered by the vice-chancellor in *Storm v. Waddell*, 2 Sandf. Ch. 510-12. In that case he observes:

"The practice of filing bills in this court by unsatisfied judgment and execution creditors, which has become so well established and familiar, is usually referred to the Revised v.6,no.8—49

Statutes as to its origin. 2 Rev. St. 173-4. The statute is undoubtedly sufficient to sustain all the argument that was presented in support of the effect of such a suit; but, as I desire to refer to cases prior to that time, when the Revised Statutes went into operation, I will advert briefly to the earlier history of this jurisdiction.

"The power of the court of chancery to aid in removing fraudulent impediments in the way of levying on the personal property liable to execution, or selling the real estate of his debtor, is an old-established ground of jurisdiction, which is not in question here.

"The bill in those cases was auxiliary to the carrying into effect the process of the law courts, and differed from our creditors' suit, now under consideration, in this: that in the suit to set aside a fraudulent conveyance of land, so as to give effect to a judgment, the bill need not allege anything more than the recovery of the judgment; and where it was to remove an obstruction affecting movable property, it was only requisite to allege an execution issued to the county where the property was situated; while in the creditor's bill, against equitable interests and things in action, the creditor must show the issuing of an execution, and its regular return unsatisfied.

"In the case of *Spader v. Hadden*, 5 J. C. R. 280, Chancellor Kent, in 1821, sustained a creditor's suit of the description now in use against moneys in the hands of Hadden, transferred to him by the debtor,—the transfer being fraudulent against creditors. This decree was affirmed by the court of errors in November, 1822. 20 John. 554. A majority of the court, with Chief Justice Spencer and Mr. Justice Woodworth, (the latter delivered the prevailing opinion,) concurred in holding that the case was one of acknowledged equitable cognizance, and the reasoning of the judge is applicable as well to the case of *funds being in the debtor's hands* as to the case decided.

"It is true that in *Donavan v. Fin*, Hopk. 59-77, decided in November, 1823, the chancellor omitted to follow the result of the decision in *Hadden v. Spader*, and viewed the

latter as a case of trust and fraud. But I submit, with great respect, that there was much more in the decision than was acceded to it in *Donavan v. Fin*. The goods assigned in *Hadden v. Spader* were sold and converted into money five months before Spader recovered his judgment, so that there was no property on which his execution could have been a lien. It was, then, the plain case of a debtor having things in action in the hands of a third person, and equity deemed it unjust that either the one or the other should withhold them from the payment of his creditors.

"The doctrine of *Donavan v. Fin* has not been followed in any case since, nor, so far as I have seen, approved by more than two judges. There is abundant evidence that it was not deemed in accordance with the decision of the highest court in *Hadden v. Spader*. And, aside from the books, I know from my own practice that it was disregarded prior to the time of the Revised Statutes.

"In the following cases the contrary was decided, or opinions to that effect given: In *Weed v. Pierce*, 9 Cow. 722-727, decided by Chancellor Walworth, when circuit judge, sitting in equity, December, 1827; *Beck v. Burdett*, 1 Paige, 305, January, 1829; *Chandler v. Pettit*, Id. 427, affirmed on appeal in December, 1829, 3 Wend. 618, 621-625; and *Edmeston v. Lyde*, 1 Paige, 673, November, 1829.

"In *Wakeman v. Grover*, 4 Paige, 23, affirmed 11 Wend. 187, the bill was filed in 1828 to reach the things in action assigned, as the goods of *Grover & Gunn*, and the decree was made against both species of property without discrimination, although the case was most desperately contested throughout. The chancellor repeated the doctrine of the above cases, at page 33 of 4 Paige; and, as recently as in 1844, he reiterated it in *Farnham v. Campbell*, 10 Paige, 601. See, also, the revisers' notes, in introducing the provisions on the subject, which are contained in the Revised Statutes. 3 Rev. St. 669, (2d Ed.)

"I may, therefore, assume that by the law of this state, as settled more than 20 years before this case arose, an unsatisfied execution creditor had a right to file a bill in this court

to compel payment of his debt out of the equitable interests and things in action of the judgment debtor. *Storm v. Waddell*, 2 Sandf. Ch. 510-12."

The authorities cited by the assistant vice-chancellor strongly support his reasoning; and I am justified in holding that, by the ancient usages of courts of equity as understood in New York prior to the Revised Statutes, chancery "would assist a judgment creditor at law in discovering and reaching personal property which had been placed in other hands; and that it made no difference whether that property consisted of *choses in action* or money or stock." 2 Kent's Com. 561.

In *Donavan v. Fin*, the point decided was that "where the subject of a suit is exclusively legal, equity has no jurisdiction to enforce or give a better remedy;" that is, to seize upon and apply to the payment of the debt equitable assets, which could not be reached by execution at law.

In *Pettit v. Chandler*, 3 Wend. 624, the same point arose incidentally, though it was not decided; but the chief justice said "*his impressions were that, under the existing law (1829) a defendant is not bound to answer as to property which never was within reach of an execution; that he could only be called on to respond as to such property as he has fraudulently withdrawn from the operation of an execution.*"

In *Hadden v. Spader*, Mr. Justice Woodworth held that a judgment creditor, after exhausting the remedies given by law, could reach the trust property of his debtor by the aid of a court of equity, and that he could resort to the debtor's *stocks and debts* due to him, *even when the stocks were not purchased or the debts created by means of the property fraudulently withdrawn from the judgment of the creditor.* To these views Chief Justice Spencer gave his explicit sanction.

Chancellor Sandford was of opinion, as we have seen, that the relief could only be given in cases which were themselves of equitable jurisdiction involving fraud or trust, or seeking to subject to the satisfaction of a judgment property in itself liable to execution, by removing a conveyance which operated as a fraudulent impediment to the execution.

In *Pettit v. Chandler*, the chief justice, Mr. Justice Marcv

and Mr. Justice Sutherland declined to express any final opinion as to this contested boundary of jurisdiction, for the power to grant relief to the utmost extent it was pushed in the case of *Hadden v. Spader* was about to become in a very few days a part of the system of jurisprudence of New York "by legislative *recognition or adoption*." This case was decided in December, 1829. The Revised Statutes of New York went into operation January 1, 1830.

The case at bar does not demand any attempt on my part to determine this disputed question as to the jurisdiction of courts of equity upon which so eminent judges have differed, for the statute of this state permits all choses in action and equitable assets to be reached by execution of law. The objection, therefore, to the jurisdiction chiefly relied on by Chancellor Sandford, in *Donavan v. Fin*, cannot here be raised. The bill, moreover, in this case is not a bill to reach equitable assets alone. It is a bill for an injunction and receiver to prevent the defendant from secreting, conveying away, and converting into money, property which is justly subject to execution, including property which is, in whole or in part, the proceeds of the property fraudulently obtained and converted by him. It seeks to arrest and baffle the execution of an avowed purpose to evade the decree of this court and to render it fruitless to the bankrupt's creditors whom he has defrauded. But the question upon which the conflict of opinion arose in New York seems, so far as the United States courts are concerned, to be authoritatively settled.

In *Board of Public Works v. Col. College*, 17 Wall. 530, the supreme court says: "The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even where there is no specific lien on the property, is undoubted."

It is objected that even if a court of equity has jurisdiction to reach assets of every description in aid of a judgment creditor, it can only do so where the assets are indicated in the bill, and that it has no authority upon mere general allegations, such as those contained in this bill, to enjoin the defendant, or to compel an assignment of all his property to a

receiver appointed by the court. It is contended that the mode of proceeding adopted in this case is peculiar to the state of New York, where it grew up under the rules framed by Chancellor Walworth, to carry into effect the provisions of the Revised Statutes of that state with regard to creditors' bills. But it would seem that Mr. Justice McLean entertained bills similar to the bill in this case without hesitation. In *Lamon v. Clark*, 4 McLean, 18, the bill alleged that "the defendant had equitable things in action and other property which cannot be reached by execution, and that he also *had debts due to him by persons unknown*." These allegations are as general and unspecific as those contained in the bill under consideration, but the bill was, nevertheless, entertained. It is asserted by counsel that this jurisdiction was taken under a statute of Michigan similar to that of New York. But the court expressly repudiated the notion that a state statute can confer jurisdiction in equity upon the courts of the United States, although the latter may adopt modes of proceeding and particular remedies, when the cause is within their jurisdiction, and the proceedings adopted are conformable to the general principles by which courts of equity are governed. And with respect to the case before it the court observes: "The jurisdiction is appropriate to chancery, and *may be exercised where there is no special statute*. Similar relief is given in England. 1 Vernon, 398; 1 P. Wms. 445; 2 Dickens, 575; Ambler, 79-455; 20 John. 563; 2 John. Ch. 283-296; 4 John. Ch. 691."

In *Pettit v. Chandler*, before cited, the bill, after alleging judgment obtained, execution issued, and return of *nulla bona*, proceeded to state that "for a long time before the recovery of the judgments Pettit had transacted, in his own name, business to a large amount in New York, and was possessed of great property, and that he had not pretended or given out that he had become insolvent, or had lost any property, but that just before the recovery of the judgments in favor of the complainant he had suddenly stopped doing business in his own name with the avowed intention of preventing the complainant from obtaining satisfaction of his judgments; that

he had so placed his property that none of it was left visible, so as to be taken upon execution, with the intent to defraud the complainant; and it particularly charged that Pettit, at the filing of the second supplemental bill, *was possessed of real or personal property, or other property of some name or nature, to a large amount; that he was possessed of or entitled to public stocks, to stock in banks, or other incorporated companies, and to rents in real estate; that he held bills of exchange, promissory notes, and choses in action to a large amount; and that property, real or personal, was held by others in trust for him, and by colorable title. The bill stated and enumerated particular acts of fraud which it charged upon the defendant, and concluded by praying a full answer and discovery, and that the defendant might be decreed to satisfy the judgments obtained against him, and that sufficient of his property be set apart for that purpose.*"

The striking similarity of these allegations to those of the bill under consideration cannot escape notice. The case came up on appeal from an order of the chancellor allowing exceptions to the answer. It was argued by eminent counsel, but it does not appear to have occurred to them, or to any member of the court, that the bill was demurrable because it did not particularly set forth and describe the property which it alleged had been concealed or conveyed away in trust for the defendant under colorable title, and the discovery of which, and its appropriation in satisfaction of the complainant's judgment, was prayed for. Mr. Justice Marcy, in delivering his judgment in this case, says: "Confining the jurisdiction of the court of chancery to the narrowest limits that have ever been assigned to it, power it certainly has, and exercises daily, of requiring answers to such allegations as the appellant in this case has wholly omitted to answer, or has answered imperfectly." Page 623. This case was decided in December, 1829.

In *Waddell v. Storms*, *ubi supra*, the practice in cases of creditors' bills is stated as follows: "Upon filing the bill an injunction is taken out, and served with the subpoena to answer, restraining the debtor from parting with *any* of his

property or effects until the further order of the court; and, for the better protection of the property and its conversion into money, a receiver is speedily appointed, who, under the order of the court, is vested *with all such property*, or with sufficient specific portions of it to pay the complainant's debt and costs, and all prior claims upon the same; and the debtor is compelled to assign and deliver such property to the receiver under the direction of a master of the court."

In *Bloodgood v. Clark*, 4 Paige, 477, Chancellor Walworth says: "In these cases of creditors' bills, where the return of execution unsatisfied presupposes that the property of the debtor, if any he has, will be misapplied, and entitles the complainant to an injunction in the first instance, it seems to be almost *a matter of course* to appoint a receiver to collect and preserve the property pending the litigation; and where the sworn bill of the complainant shows that he has an equitable right to all the funds and property of the defendant to satisfy his debt, and if the right of the complainant is not denied by the defendant in answer to the application for a receiver, there can be no good reason why the complainant should not have a receiver appointed to preserve the property from waste and loss. Indeed, this court has already declared that it is the duty of a complainant, who has obtained an injunction upon such a bill restraining the defendant from collecting his debts or disposing of property which might be liable to waste or deterioration, to apply to the court and have a receiver appointed without any unreasonable delay. See *Osborn v. Heyer*, 2 Paige, 343. It is no sufficient answer to such an application to say there may not be any property to protect, as the complainant proceeds at the peril of costs if there be no property; and, if there is nothing for the receiver to take, the defendant cannot be injured by the appointment."

In *Edmeston v. Lyde* the chancellor says: "The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of this court are perfectly adequate to carry that principle into full effect." 1 Paige Ch. 641, decided in 1829. See, too, 25 Barb. 663.

The text-writers lay down the same principle *passim*. Thus Barbour says: "Upon a creditor's bill every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, and his debts, choses in action, and other equitable rights may be assigned or sold pending the decree of the court for that purpose. 2 Barb. Ch. Pr. 152. Under the practice of the New York courts of chancery it was held that the order of reference should authorize the master to appoint a receiver of all the property, equitable interests, things in action, and effects belonging to the debtor. * * * It should also require the defendant to assign to the receiver, under the direction of the master, *all* his property and effects." High on Rec. § 415; 1 Barb. Ch. 309, 315-17; 1 Sandf. 723. But a discretionary power is sometimes exercised as to the amount of the debtor's property to be assigned. High on Rec. § 429. He was compelled, as we have seen, to assign even when he denied that he had any property. *Bloodgood v. Clark, supra*.

Until the statute of 1 and 2 Victoria, c. 110, § 20, writs of execution were unknown to the English courts of chancery. Daniell, Ch. Pl. and Pr. 1042.

"The decrees of the court were enforced by process of contempt, and the party entitled to the benefit of the decree might obtain a writ of sequestration directing the commissioners therein named to sequester the personal property of the defendant, and the rents and profits of his real estate, until he had cleared his contempt. Originally, this process was merely used as a means of coercing the defendant by keeping him out of the possession of his property; and the practice of applying the money received by the sequestrators in satisfaction of the sum decreed to be paid is of comparatively modern origin. This, however, as we shall see in the next section, has become the usual course of procedure, and the court will now, after a sequestration has been issued to enforce a decree for the payment of the money, order the sequestrators to apply what they have received by virtue of the sequestration in satisfaction of the duty to be performed." Daniell, Ch. Pl. and Pr. 1032-3.

The counsel for defendant cites no authority in support of his position that the practice of entertaining "fishing" bills to reach assets not specifically described in the bill, and of appointing a receiver over all the property of the defendant, is entirely the creation of the New York Revised Statutes, and of the rules framed under it by Chancellor Walworth. The provisions referred to were introduced into the Revised Statutes of New York chiefly to set at rest the *questio vexata* which had been raised by the cases of *Hadden v. Spader* and *Donavan v. Fin*, already noticed. See Revisers' Notes, 3 Rev. St. 669, (2d Ed.) Authority was given to compel, in aid of an unsatisfied judgment creditor, a discovery of any property, money, or things in action due to the debtor or held in trust for him, and to prevent the transfer of any such property, etc., and to decree satisfaction out of such property, "*whether the same was originally liable to be taken in execution or not.*" The doctrine of *Hadden v. Spader* was thus explicitly recognized or adopted by legislation; but the powers of the court of chancery were not otherwise enlarged. It was merely authorized to do with regard to assets not originally liable to execution what it had always been conceded it had a right to do with regard to stocks, debts, etc., purchased by means of property *fraudulently withdrawn* from execution.

The fact, therefore, that Chancellor Walworth adopted, and, until the court of chancery was abolished, maintained, the rules in question, is the strongest argument to show that the practice thus established was agreeable to the general principles and methods of equity procedure. Certainly the authority to entertain "fishing" bills to reach undescribed assets, and to appoint a receiver of all the property of the defendant, is not in terms conferred by the statute.

The appointment of a receiver of all the property of the defendant is in truth, as we have seen, in the nature, not of an attachment, but of a sequestration, which, by the ancient practice of the court of chancery in England, issued, as of course, upon the failure of the defendant to comply with the decree, (*Daniell*, 1047-1048;) and the process of sequestration is still in use in England, *Id.* 1042. We have also seen

that the court will now, where a sequestration has been ordered to enforce a decree for the payment of money, order the sequestrators to apply what they have received, by virtue of the sequestration, in satisfaction of the decree. When, therefore, the aid of equity was invoked in behalf of an unsatisfied judgment creditor, and it was settled that all his property, choses in action, debts due him, etc., could be reached, the order for the appointment of a receiver, and for the compulsory assignment to him by the defendant of all his property, was in entire accordance with the ancient usages of the court of chancery, when compelling obedience to its own decree.

The counsel for the defendant insists with much earnestness that the bill under consideration is identical with an ordinary creditor's bill, and is to be treated precisely as if brought in aid of an unsatisfied judgment at law. But in such case chancery has no jurisdiction of the original demand. It can only interpose after the demand has been established at law, and after it has been shown by the return of an execution unsatisfied that the complainant is remediless at law. But in the case at bar the original suit was of equity cognizance. The decree was obtained in this court; and perhaps a writ of sequestration might have issued at once upon the failure of the defendant to comply with the decree, as it certainly could have done if the decree had been for the specific performance of some act. Equity rule 8, Sup. Ct. However this may be, no doubt can, I think, be entertained as to the power of the court to arrest and baffle the defendant, who has already been adjudged guilty of a flagrant fraud in his attempt to consummate it and secure its fruits, in avowed defiance and contempt of the court.

Says Mr. Chancellor Walworth: "Where such a fraud has been actually committed by a debtor, where he has intentionally placed or even left that property, which ought to have been devoted to the payment of his honest debts, in the hands of a third person, with a view to evade the justice of the law, and this court, by its ordinary course of proceedings, can reach such property without doing injustice to any, it does not deserve the name of a court of equity if it has not juris-

diction to afford relief to the injured creditor." *Wend v. Pierce*, 9 Cow. 724. Still less would it deserve that name if it should refuse that relief in the only form in which it can be effectual—viz., by injunction and order for a receiver—on the ground that the defendant has so far carried out his threat to secrete and make way with his property that the complainant is unable to find it or describe it in his bill.

If this court refuses to interpose until, by bill of discovery or proceedings supplementary to execution, the creditor is able to specify and describe the character of the property, it, in effect, invites the defendant to frustrate its decree, by sending the property or its proceeds out of the jurisdiction, or by conveying it to innocent or pretended innocent purchasers, or otherwise disposing of it in such a way as to place it beyond the reach of the court.

Motion denied.

HATCH and another v. THE WALLAMET BRIDGE CO.

(Circuit Court, D. Oregon. April 21, 1881.)

1. INJUNCTION.

A preliminary injunction granted to restrain the erection of a bridge across the Wallamet river, at Portland, contrary to the act of congress (11 St. 383) declaring the navigable waters of the state free and common highways, at the suit of a riparian owner injured thereby.

2. OBSTRUCTION TO NAVIGATION.

Where congress has declared a navigable river to be a common highway, the state cannot authorize an obstruction therein, and anything which materially interferes with or limits the navigability thereof, considering the use which it is or may be subject to, is an obstruction and a violation of such act of congress, which the United States circuit court has jurisdiction, under the judiciary act of 1875, (18 St. 470,) to prevent or abate by injunction.

In Equity. Application for preliminary injunction.

Hugh T. Bingham, Edward Bingham, and E. C. Bronaugh,
for plaintiffs.

H. Y. Thompson, W. Lair Hill, and Byron B. Bellinger,
for defendant.

DEADY, D. J. This application was first heard before me sitting in this court alone, and on April 6th I delivered an opinion thereon, to the effect that the bridge where and as it was being constructed by the defendant was a serious obstruction to the navigation of the Wallamet river, contrary to the act of congress of February 14, 1859, (11 St. 383,) admitting the state into the Union, which declares that all the navigable waters of the state "shall be common highways and forever free" to all the citizens of the United States; and that this court, under section 1 of the act of March 3, 1875, (18 St. 470,) giving it jurisdiction of a suit arising under an act of congress, has authority to restrain parties from violating said act by obstructing the navigation of any of said waters at the suit of any one injured thereby.* But, considering the importance of the matter to the defendant, I did not then direct the injunction to issue, but continued the application for further hearing, upon the same and such additional evidence as the parties might produce, when the circuit judge, Mr. Justice Sawyer, should be present, and restrained the defendant, as prayed in the bill, in the meantime. That hearing has been had, and the conclusion reached by his honor, the circuit judge, will now be announced by him. As preliminary thereto, I merely wish to say for myself that the further thorough investigation of this question, and able argument of the case *pro* and *con*, has only deepened my conviction that the proposed bridge is and will be a nuisance and serious impediment to the navigation of this river.

The law of the case upon which the contention mainly turned upon the first hearing is now admitted by the defendant to be correctly stated in the opinion then delivered by myself.

The only remaining question for consideration is, will the erection of this bridge seriously impair or affect the navigability of the river? If it appears probable that it will, the defendant ought not to be allowed to proceed further in the commission of the wrong. It has been well said, by some scientific authority upon this subject, that any bridge is a

*See *ante*, 326.

serious obstruction to the navigation of a river which can be essentially improved. Upon the evidence, and in the very nature of things, there can be no doubt that this bridge, where and as it is being constructed, is a serious obstruction to the navigation of the river. It will absolutely obstruct the navigation of the river, except for the space of 100 feet on either side of the pivot pier, and these openings are altogether too narrow to admit the safe and convenient passage of the sea-going vessels that come to this port, or even the larger class of river-boats, except in favorable conditions of wind and water. Indeed, the further investigation of this matter makes it appear very probable to my mind that no bridge, unless it be a suspension one, can be constructed over the river at this point without being a serious obstruction to its navigability, and impairing its usefulness as a common highway for the citizens of the United States.

The Wallamet river in front of Portland is not only a navigable stream with a ship channel: it is also a sea-port,—the harbor, as I have before said, of “the emporium and financial center of the northwest,”—and to all appearance is destined to be second to no city in importance on the Pacific coast save one. Probably nine-tenths of the exports produced west of the Rocky mountains and north of the forty-second parallel are gathered here for sale and shipment abroad upon sea-going vessels of, in some cases, 3,000 tons burden. Every bushel of grain grown for export over this vast region, and particularly in the great Wallamet valley, feels the cost of storage and dockage at this port, and anything which limits or restricts the capacity or convenience of its harbor works a direct injury to the great body of the producers throughout the country. Therefore it is that the convenience of the comparatively small population immediately east of Portland, or even in Portland, is not alone to be considered in this matter. The river is the navigable water of the people of the United States, and the harbor is for the free use of all the people whose exports and imports freight the vessels that frequent it from all parts of the world. At this point, on the west bank of the river, the ox teams of the Wallamet valley first met the sea-going ves-

sel, and the traffic between them was the beginning of Oregon's commerce. Out of this commerce grew the town of Portland. But destroy or materially restrict or impede the free use of this harbor, or the approaches to it, and so far you destroy the town and injure the commerce of the country.

The injunction ought to be allowed.

SAWYER, C. J. I have very little to add to what the district judge has said. I fully concur with him in the conclusions that he has reached. It is very clear that, under the admitted law of the case, the act admitting the state into the union which provides that the navigable waters of the state shall be free and common highways; and in view of the decision of the supreme court in the *Wheeling Bridge Case*, 13 How. 518, in which it was held, under a similar act, that any obstruction to the navigation of the Ohio river was unlawful, except by the consent of congress; and the judiciary act of March 3, 1875, giving this court jurisdiction of a suit arising out of an act of congress,—that this court has authority to restrain the defendant from placing any structure in this river which will obstruct its navigation.

The only remaining question, then, is whether the bridge now being constructed by the defendant will be such an obstruction. To my mind the testimony clearly indicates that the bridge is and will be an unlawful obstruction to navigation. And I think this must be apparent to every person familiar with the subject, or even of general intelligence. If it is at all a material obstruction, it comes within the inhibition of the statute, and is unlawful. It was argued by counsel for the defendant that the commerce of the country is not all carried on up and down or upon the river, and that the commerce and convenience of the people which cross it must be taken into consideration in determining the propriety of bridging it. It may be of importance to the cities upon either bank of the river that they should have communication by means of a bridge; but these are considerations to be addressed to another tribunal than this court. They should be addressed to congress, where, upon an application for per-

mission to bridge the river, these conflicting interests can be considered and adjusted as may be thought best for the public good.

But this court must simply ascertain whether the bridge will be a material obstruction to the navigation of the river. It cannot balance these conflicting interests and determine that the one will be more benefited by the bridge than the other will be injured thereby. Its power is confined to the determination of the question whether it will be a material obstruction to navigation or not.

In the *Wheeling Bridge Case* the obstruction caused by the bridge, as compared with the benefit, was exceedingly small. That suit was commenced in 1849, when the commerce on the Ohio was more limited than now, and the bridge was a connecting link in a great public highway by rail and otherwise. The referee reported that, of all the steam-boats then running on the river, only nine were prevented from passing the bridge on account of the great height—from $63\frac{1}{2}$ to 80 feet—of their "chimneys," and they for only a few days in the year. And although these chimneys might have been shortened or lowered, when passing the bridge, by means of hinges, and although the benefit resulting to navigation in the increased draft given by such tall chimneys must have been small in comparison to the benefit to commerce resulting from the bridge, yet the latter was determined to be a violation of the act of congress declaring the navigation of the river "free and common to the citizens of the United States," and the court ordered it abated as a nuisance. As I said during the hearing, it appears from the evidence that the draw is too narrow to admit the passage of the larger vessels that come here, and on that account the bridge is an obstruction to navigation; and I am satisfied that the further investigation of the subject will make this more apparent. But I am also satisfied that this bridge, whatever the width of the draw, will be an obstruction if erected in the midst of this harbor.

In the course of the argument the question was asked of counsel: Would not even these piers, without a bridge upon

them, standing where they are, be regarded as a nuisance and have to be removed? Now, the fact that you put a bridge upon them does not render them any the less an obstruction, but more so. Located, as it is, right in the midst of the harbor, where vessels are required to move constantly from place to place, without a passage, except at the single point of this draw, the bridge will be a serious obstruction to navigation in the harbor even if the draw was sufficient for the passage of vessels up and down the stream. The act of congress does not limit the free navigation of the river to a particular part or channel, but it declares the whole river a free and common highway to the full extent of its capability of navigation. A bridge may not be a material obstruction to the navigation of a river, if erected at a point where vessels simply pass up and down the channel on their way to and from a port. But, in the case of a harbor like this, the location, surroundings, and circumstances must be considered, and they may require that no part of it be obstructed or closed to navigation. In this view of the matter I think that any bridge in this harbor would necessarily be such an obstruction to its navigation as to require the consent of congress to justify it.

This place is a commercial center—the second port in importance on the Pacific coast—mainly because ocean vessels of a large size can come to its docks. Therefore it is a serious question whether the people of Portland or the state of Oregon can afford to allow a bridge to be built in the midst of this harbor, at a point where ships must congregate, and thereby create such an obstruction therein as may, and probably will, turn the commerce of the city in other channels. This harbor is not large, and when the shipping here is much increased, as it doubtless will be with the growth of the country and the place, there will be no room to spare in it. Ships often remain in the harbor of San Francisco three or four months waiting employment. But they could not afford to incur the expense of lying at the docks all this time. They pay wharfage a few days, while at the docks discharging or taking in cargo, and in the mean time draw out into the

stream, where they can lay without expense. All the navigable waters of this harbor will be needed for the use and accommodation of shipping. In San Francisco, where a large portion of the shipping lies out in the stream, my recollection, from judicial investigation, is that a clear passageway of 600 feet or yards—I think the latter—from the end of the wharves is always kept open, and even then collisions often occur, as the records of the courts there will show.

All these things are to be considered in determining whether it is good policy, even if congress could be brought to consent to it, to bisect this harbor with a bridge that would render it unnavigable along its line, except at a particular point. But when we consider the commerce of the city, the size of the harbor, and the character of the vessels that come to the port, we think the erection of this bridge will prove a great obstruction to the navigation of the river, both on account of the insufficiency of the draw, and, generally considered, as a bridge, and therefore be injurious to the plaintiffs; and, so considering, we feel bound to grant this injunction.

Objection has been made that the plaintiffs have been guilty of delay in applying for this preliminary injunction. There are cases in which such an objection has force, but it does not apply here. This is a matter in which a large number of people are interested, and usually what is everybody's business is nobody's business. It is a large task for any one man to undertake to conduct a litigation against a large company, and it is one he would not undertake unless he was compelled to. It is alleged in the bill, and the evidence shows, that the plaintiffs have actually been compelled to sue, because the owners of vessels have refused to take them to their wharves on account of the danger of passing this construction, even in its present condition, when there is something more than the mere draw to go through; and they may not have been aware of the extent that the bridge would prove an obstruction, until it was so developed and shown. The bill was filed in January, and I think there has been no great delay, the circumstances considered.

Another satisfactory answer to this objection is the fact that, upon the evidence now in the case, or that is ever likely to be, and the knowledge which is open to every one, that in all probability this injunction must be finally sustained. If the injunction is not now issued, and the defendant is allowed to go on and finish the bridge before the final determination of this suit, it would then have to be removed, if the court so adjudged, as it probably would, unless congress, in the mean time, should see fit to authorize it, as it did the Wheeling bridge, which, considering the character of the obstruction, is not at all probable.

The amount of the bond to be given by the plaintiffs I will leave to be settled before the district judge.

DEADY, D. J. For the convenience of parties, I now say that I think the bond ought to be given in a sum not exceeding \$25,000, and that, unless cause is shown to the contrary, the order of the court will be that the injunction issue upon the plaintiffs giving bond in that sum, with sufficient sureties, to be executed before and to the approval of the master of this court, Mr. William B. Gilbert.

FARGO v. THE LOUISVILLE, NEW ALBANY & CHICAGO RY. CO.

(Circuit Court, D. Indiana. May 3, 1881.)

1. JOINT-STOCK COMPANY—CITIZENSHIP—SUIT IN NAME OF PRESIDENT.

A New York joint-stock company possessing the right, by the law under which it was organized, to sue and be sued in the name of its president or treasurer, is a citizen of the state of New York in the same sense that corporations are citizens of the states under whose laws they are organized; and such joint-stock company may, by the comity of states, sue and be sued in the name of such officer in the federal courts as a citizen of New York, even though shareholders of such joint-stock company are citizens of the same state as the adverse party to the suit.

2 SAME—CORPORATE FRANCHISES.

In determining what such joint-stock companies are, regard is to be had to their essential attributes rather than to any mere name by

which they may be known. If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation because the statute calls it something else, or even designates it as an "unincorporated association."

3. SAME—FEDERAL JURISDICTION.

The reasons which induced the supreme court to hold that, for the purposes of federal jurisdiction, corporations are to be regarded as citizens of the states whose creatures they are, call with equal force for a similar ruling as to joint-stock companies organized under the laws of New York.

In Equity. Motion to Dismiss Suit for Want of Jurisdiction.

Isaac Caldwell and *E. F. Trabue*, for respondent, cited the following authorities: The American Express Company, not being a corporation, cannot sue as one in its corporate name or by its president. *Louisville, etc., R. Co. v. Letson*, 2 How. 497; *Marshall v. B. & O. R. Co.* 16 How. 314; *O. & M. R. Co. v. Wheeler*, 1 Black, 286. All shareholders must therefore be citizens of other states than Indiana. *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Bank of U. S. v. Deveaux*, Id. 85; *Breithaupt v. Bank of Georgia*, 1 Pet. 238; *Bank of Cumberland v. Willis*, 3 Sumn. 472; *North River Co. v. Hoffman*, 5 John. Ch. 300; *Bank of Vicksburg v. Slocum*, 14 Pet. 60; *Whitney v. Mayo*, 15 Ill. 254; *Baldwin v. Lawrence*, 2 Simon & Stuart, 18; *Leigh v. Thomas*, 2 Vesey, Sr. 312; *Stroubridge v. Curtis*, 3 Cranch, 257; *Cameron v. McRoberts*, 3 Wheat. 591. The president of such a joint-stock company is practically a corporation sole for the purpose of suing and being sued. *Life Ass'n of America v. Rundle*, (U. S. Supreme Court, 1881,) 12 Cent. Law J. 130; 13 Chic. Leg. N. 185; *Reddish v. Pinnock*, 10 Exch. 220; *Chapman v. Milvain*, 5 Exch. 61; *Hybart v. Parker*, 93 E. C. L. 212; *Westcott v. Fargo*, 61 N. Y. 547; *Overseers v. Sears*, 22 Pick. 125; *Liverpool, etc., Ins. Co. v. Massachusetts*, 10 Wall. 566.

Sherman S. Rogers and *A. W. Hendricks*, for complainant, cited the following authorities: There is no want of jurisdiction unless the Indiana shareholders are indispensable parties. *West v. Randall*, 2 Mason, 196; *Payne v. Hook*, 7 Wall. 431; *Hotel Co. v. Wade*, 97 U. S. 13-21; *Story's Eq. Pl. §§ 72-100*; *Horn v. Lockhart*, 17 Wall. 570; *Shields v.*

Barrow, 17 How. 130. It would be a denial of justice to require all the shareholders to be made parties. *Hichens v. Congreve*, 4 Russell, 562; *Walworth v. Holt*, 4 Mylne & Craig, 619; *Richardson v. Hastings*, 7 Beav. 323, 11 Beav. 17. As to the character of joint-stock corporations. *Waterbury v. Merchants' Union Ex. Co.* 50 Barb. 158. The American Express Company, notwithstanding the residences of its shareholders, is, for the purpose of federal jurisdiction, a citizen of New York. *Fargo v. McVicker*, 55 Barb. 438-443. The bill must show that all shareholders are citizens of other states than Indiana. *Anderson v. Jackson*, 2 Paine, 426; *Keeley v. Harding*, 5 Blatchf. 502; *Wood v. Mann*, 1 Sumn. 580; *Bingham v. Cabot*, 3 Dallas, 382; *Turner v. Enville*, 4 Dallas, 7; *Bobyshall v. Oppenheimer*, 4 Wash. 483; Pomeroy on Remedies, etc., § 392. A circuit court is of limited jurisdiction, and a cause will be presumed to be without its jurisdiction unless the contrary appear from the record. *Turner v. Bank of North America*, 4 Dall. 11.

GRESHAM, D. J. This is a suit in equity brought by William G. Fargo, a citizen of the state of New York, individually, and as president of the American Express Company, against the Louisville, New Albany & Chicago Railway Company for an injunction and other relief. The grounds of jurisdiction assigned in the bill are—(1) That the right of the American Express Company to sue and be sued in the name of its president is a franchise conferred upon it by the legislature of New York, which, by comity, follows it into other states where it is permitted to do business; also, that the president is a natural person and a citizen of the state of New York, and the defendant is a citizen of the state of Indiana. (2) That if it be held that the complainant, as such president, is not entitled to maintain the suit under the laws of New York, then he brings the suit, not only in his own name and behalf individually as a shareholder in the company, but also in behalf of such of the other numerous shareholders not citizens of the state of Indiana as shall come in and be made parties to the suit, and share in the expense thereof.

The defendant's objections to the jurisdiction of the court are that the American Express Company is not a corporation, but a mere voluntary association, with no existence as an entity separate from the existence of its members; that, not being a citizen in the sense in which a corporation is, it can sue only with the names of all its associates, who, upon the face of the bill, must appear to be citizens of states other than the state of Indiana; that the New York Statutes, which, it is claimed, authorized this suit to be brought in its present form, permit the president to sue only when all the stockholders can sue, and that all the stockholders of this company could not sue, because they are all of the same class, and some of them are citizens of the same state as the defendant; that the laws of New York, which confer upon this company certain corporate franchises, have no extraterritorial effect, and that the jurisdiction of this court is not of comity, but of constitutional right. The judicial power of the United States is extended by the constitution to "controversies between citizens of different states," and by the judiciary act jurisdiction is conferred upon the circuit courts of the United States when "the suit is between a citizen of the state where the suit is brought and a citizen of another state." It is now settled that for the purposes of federal jurisdiction corporations are regarded as citizens of the states where they are created, and no averment as to the citizenship of the members elsewhere will be permitted.

Is the American Express Company, which is a joint-stock company, organized under the laws of New York, a citizen in the same sense and for the same purpose? In chapter 258 of the laws of 1849 of the state of New York, and in subsequent amendatory acts, joint-stock companies may sue and be sued in the name of the president and treasurer when the nature of the cause of action is such that the suit might be maintained by or against all the shareholders. Such companies are endowed with perpetual succession, dissolution not resulting from changes in membership produced by death or otherwise. A pending suit by or against the president or treasurer of the company is not abated by the death, resigna-

tion, or removal of such officers; and a judgment against the president or treasurer, as such, is not a lien upon their individual property, but execution is levied upon the property of the company only, the shareholders being liable individually after an ineffectual effort to thus collect the debt from the company. These are privileges that are not enjoyed by natural persons or partnerships. While these companies have no common seal, it is difficult, in other respects, to distinguish them from corporations. They are organized under general laws very much as incorporations are now usually organized. Their stock is divided up into shares and sold on the stock boards, just as the stock of corporations is divided up and sold.

Corporations are artificial persons—ideal creatures of the state—and so are New York joint-stock companies. It is of no consequence that in the statutes under which these companies are organized they are called “unincorporated associations.” In determining what such institutions really are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation for being called something else. Section 3, art. 8, of the constitution of New York declares that “the term corporation, as used in this article, shall be construed to include associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue, and shall be subject to being sued, in all courts in like cases as natural persons.” It is urged, however, by counsel for the defendant that the statute which confers the right upon these companies to sue and be sued in the name of the president or treasurer relates to the remedy only, and that it can have no extraterritorial effect.

Experience demonstrated the usefulness of these institutions in carrying on trade and business, and convenience required that they should be allowed to sue and be subject to suit in the name of an individual who should represent the

companies as distinct from the individuals composing them. The right of such companies to sue, and of others, including their own shareholders, to sue them, could not be acquired by agreement between the associates. In England, by an act of parliament, a public officer is designated to represent the individuals composing joint-stock companies in the courts, both as plaintiff and defendant, and a judgment taken against him, in his representative capacity, binds only the property of the company. In New York, where the same necessity was felt for a representative of joint-stock companies in litigation both by and with them, the legislature provided that suits might be brought by and against such companies in the name of the president or treasurer. Aside from considerations of convenience, it would be a practical denial of justice to hold that such organizations, representing as they do large interests, with numerous and ever-changing shareholders, can sue and be sued only in the names of all their associates, as in the case of partnerships. It is only by comity that a corporation which has been created by one state is permitted to carry on its business in other states, and there sue in its corporate name; and it is not easy to assign a reason why the same rule of comity should not apply in favor of joint-stock companies, which in character are not unlike corporations.

In 1855 the legislature of Indiana passed an act (1 Davis, 466) relating to express companies. At that time, and ever since, the express business in this state has been done by foreign companies organized as this company was. By this act it is declared that all such companies, (and clearly foreign companies are contemplated,) before entering upon business in any county in this state, shall file in the clerk's office of that county a statement of their membership, the amount of capital invested in their business, and an agreement that service of process upon any agent of the company shall be deemed good service on the company. Here was a recognition by the state of the existence of express companies like the American, with all the privileges which they enjoyed where organized, one of which was the right to sue in a representative or common name.

The legislature of Massachusetts passed a statute which imposed upon each fire, marine, and fire and marine insurance company, incorporated or associated under the laws of any government or state other than one of the United States, a tax of 4 per cent. upon all premiums charged or received on contracts made in that state for insurance of property. With this statute in force, the state of Massachusetts filed a bill in its supreme judicial court against the Liverpool & London Life & Fire Insurance Company to collect a tax of 4 per cent. on its premiums upon contracts made in Massachusetts, and to restrain the company from doing further business until the tax was paid. Payment of the tax was resisted on the ground that the defendant was an association of natural persons, under certain deeds of settlement and especial acts of parliament, and not a corporation. In these acts of parliament, conferring privileges on the company, it was declared not to be the intention to make it a corporation. The supreme court of Massachusetts gave a decree against the company. In affirming the case on appeal the supreme court of the United States held (10 Wallace, 566) that, as the law of corporations is understood in this country, the Liverpool & London Life & Fire Insurance Company was exercising corporate franchises in Massachusetts, and that it was liable as a corporation to pay the tax under the statute of that state.

In the case of *Westcott v. Fargo*, 61 N. Y. 542, it was held that under section 3, art. 8, of the constitution of New York, and under the legislation of that state, already alluded to, the president of the American Express Company was to be deemed a corporation sole for the purpose of suing and being sued in the courts of that state. The reasons which induced the supreme court to hold that, for the purposes of federal jurisdiction, corporations are to be regarded as citizens of the states whose creatures they are, call with equal force for a similar ruling in favor of joint-stock companies which are organized under the laws of New York. It is no less convenient for the public than it is for these companies that they should be allowed to sue and be sued in the name of the presi-

dent or treasurer. If they are not allowed the privilege of thus suing they cannot be thus sued. The American Express Company has a capital stock of \$18,000,000, with more than 3,000 shareholders. Its right to sue and its liability to suit in the name of its president or treasurer is a franchise conferred upon it by the laws of New York, which by comity should and does follow it into other states, and William G. Fargo, who brings the suit as president, is a citizen of New York, and the defendant is an Indiana corporation and a citizen of that state.

For these reasons I think the suit is properly brought, and, without deciding other questions which were argued by counsel, the motion to dismiss for want of jurisdiction is overruled.

CHAPIN *v.* WALKER and others.

(*Circuit Court, D. Arkansas.* ———, 1881.)

1. AFFIRMATIVE RELIEF IN EQUITY—CROSS-BILL.

Any affirmative relief sought by a defendant in an equity suit must be by cross-bill, and can never be granted upon the facts stated in the answer.

2. BILL TO FORECLOSE MORTGAGE—MORTGAGEE'S TITLE CANNOT BE QUESTIONED.

According to the practice which prevails in the federal courts in a suit to foreclose a mortgage, the mortgagee's title cannot be questioned: it must be investigated at law.

3. STATEMENT OF CASE—DECREE.

The answer of a respondent to a bill in equity to foreclose a mortgage denied the complainant's title, set up an adverse title as mortgagee, and prayed that complainant's mortgage be declared void, and that the respondent's lien be declared a first and prior lien on said land. *Held*, that the title of complainant could not be questioned in the proceedings to foreclose, but the decree in this case would be modified so as to provide that the decree and sale thereunder should be without prejudice to respondent's right to contest the title to the land in question by an action at law.

In Equity.

This is a bill in equity to foreclose a mortgage executed by respondent Dempsey R. Walker to John C. Burrage, conveying certain real estate to secure the payment of a promissory note. The bill alleges default in the payment of said note; that complainant is the holder and owner of the same, and entitled to foreclosure; and that the other respondents, including A. A. Brockway, have, or pretend to have, some claim to or interest in or lien upon said mortgaged premises; but that said claim, interest, or lien is subsequent and subordinate to the lien of complainant. The answer of respondent Brockway alleges that "on the thirteenth day of January, 1876, the date of complainant's mortgage, as set out in his bill, the said property described in his said mortgage as [describing it] was owned by and the title was in the government of the United States, and that the same was then, and for a long time afterwards, a part of the public lands of the United States; and that neither at the date of the said mortgage, nor at any time since, has the said Dempsey R. Walker, the mortgagor, had any title or interest in said real estate, and that neither the complainant nor his assignor took any interest in or lien on said real estate by virtue of the said mortgage set out in complainant's bill." It is further alleged that on the twenty-sixth day of March, 1877, one Nicholas Walker entered the land in controversy, and received a patent therefor from the United States, and that he afterwards executed to the said respondent Brockway a mortgage upon the same, which he still holds unsatisfied. The prayer of the answer is that complainant's mortgage may be declared void and held for naught, and that respondent's lien be declared a first and prior lien on said land.

Brown & Campbell, for complainant.

Webb & Glasse and *T. C. Corey*, for respondent Brockway.

McCRARY, C. J. There are several objections to granting the relief sought by the respondent.

1. In the first place, if he were entitled in this case to that relief, it would be necessary for him to seek it by a cross-bill. It is well settled that any affirmative relief sought by a defendant in an equity suit must be by cross-bill, and can never

be granted upon the facts stated in the answer. Story's Equity Pleading, (Redfield's Ed.) § 398a; *McConnell v. Smith*, 23 Ill. 611; *Armstrong v. Pierson*, 5 Iowa 317.

2. It is also well settled, that, according to the practice which prevails in the federal courts in a suit to foreclose a mortgage, the mortgagee's title cannot be questioned. The question of title must be investigated at law. In a foreclosure proceeding the court will not inquire what interest the mortgagee has in the mortgaged premises. 2 Jones on Mortgages, § 1482; *Bull v. Meloney*, 27 Conn. 560; *Palmer v. Mead*, 7 Conn. 149; *Hill v. Meeker*, 23 Conn. 592; *Williams v. Robinson*, 16 Conn. 517; *Dial v. Reynolds*, 96 U. S. 340.

In the last-named case the supreme court, per *Swayne*, J., say: "It is well settled that in a foreclosure proceeding the complainant cannot make a person, who claims adversely to both the mortgagor and mortgagee, a party, and litigate and settle his right in that case. *Barbour*, Parties in Equity, 493, and the cases there cited."

In *Hill v. Meeker*, *supra*, it appeared that the title of the mortgagee to one of several tracts of land embraced in the mortgage was denied. The case was exactly analogous to the one at bar, and the court held that the complainant could take the decree of foreclosure, leaving the parties at liberty to litigate the title in an action at law.

The decree in this case will be modified so as to provide that said decree, and the sale thereunder, shall be without prejudice to the right of the respondent Brockway, by proper legal proceedings, to contest the legal title to the land described in the answer as claimed by him.

WALSH and others v. MEMPHIS, CARTHAGE & NORTHWESTERN
R. Co. and others.

(Circuit Court, E. D. Missouri. March 28, 1881.)

1. JOINDER OF PARTIES.

A corporation is a necessary party defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders.

2. SAME.

All the stockholders are also necessary parties in such a suit, if they apply to be heard.

3. JURISDICTION—WHEN SUIT IS NOT WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES.

If A. and C. are citizens of the same state, and B., C., and D. are citizens of different states, a suit in which A. and B. are plaintiffs and C. and D. defendants, and in which they are all necessary parties, is not one over which a United States court will take jurisdiction, on the ground that the controversy is "between citizens of different states." To give a United States court jurisdiction on that ground the controversy must be wholly between citizens of different states.

In Equity. Motion to Remand.

This was a suit in equity to enforce certain judgments against the Memphis, Carthage & Northwestern Railroad Company, by compelling contribution from holders of unpaid stock, and for other purposes. It was originally commenced in the circuit court of the city of St. Louis, in the state of Missouri, by George W. Walsh, Union Savings Association, a corporation, William Lee, Joseph Shippen, Edward Burges, James J. Marks, and Hiram Driggs, citizens of the state of Missouri, H. R. Beers, A. M. Jay, S. M. Sovern, S. Pitzer, J. F. Pitzer, and Alfred Palmer, citizens of the state of Kansas, against Joseph Seligman, James Seligman, Jesse Seligman, John A. Stewart, J. M. Brown, and James M. Hyde, citizens of the State of New York, Memphis, Carthage & Northwestern Railroad Company, St. Louis & San Francisco Railroad Company, A. A. Talmage, C. W. Rogers, W. J. Tower, Ezra Miller, and James Baker, citizens of Missouri, and R. W. Wright, a citizen of Kansas. The petition for removal was made by defendant Jesse Seligman alone, and set forth that he was a citizen of the state of New York; that

the controversy was wholly between citizens of different states; that the whole matter in controversy was as to the liability of the petitioner and his co-defendants, Joseph and James Seligman, and that the other defendants were only nominal parties.

Motion was made to remand upon the following grounds, viz.: (1) Because only one of the defendants, Jesse Seligman, petitioned for the removal, and because the suit was not one in which there could be a final determination of the controversy, as far as concerned him, without the presence of the other defendants; (2) because the controversy in the suit was partially between parties who are citizens of the state of Missouri, and not wholly between citizens of different states, between whom it could be fully determined; (3) because the controversy was not wholly as to the liability of said Jesse, James, and Joseph Seligman, but involved questions as to rights of property in which other defendants were interested.

Joseph Shippen and John P. Ellis, for motion.

Broadhead, Slayback & Hauessler, for petitioning defendant.

McCARY, C. J. The corporation defendant is a necessary party to a bill to enforce a judgment against it by compelling contribution from its stockholders. All the stockholders are likewise necessary parties, if they apply to be heard, to the end that each may be assessed his equitable share only. Hence it is that in this case the controversy is not wholly between citizens of different states, and cannot be finally determined as between them.

Motion to remand sustained.

In re RECEIVERSHIP OF IOWA & MINNESOTA CONSTRUCTION CO.

(Circuit Court, D. Iowa. ———, 1881.)

1. REMOVAL — PETITION OF INTERVENTION WITHOUT PROCESS NOT A "SUIT."

Before a suit is pending in a state court, for the purposes of the removal act, it must be a suit within the meaning of the state law, and the mere filing of a petition of intervention, without the issuing or service of notice or process of any kind, does not constitute a *suit* within the meaning of the law of Iowa. Section 2599, Code of Iowa, 1873.

Motion to Remand.

The Iowa & Minnesota Construction Company is a corporation existing under the laws of Iowa. On the second day of February, 1875, one L. Schoonover filed his petition in the circuit court of Jones county, Iowa, alleging that he had previously, as trustee for Stacy & Walworth, obtained judgment against said corporation for \$3,759.57, which remains unpaid; that the capital stock of said corporation was \$100,000, and had been subscribed by certain persons who were named, and that said capital stock had not been paid in to a greater extent than 20 per cent. of the amount subscribed. It was further alleged that said corporation was insolvent, and that the petitioner could find no property or assets to satisfy the aforesaid judgment. Thereupon the petitioner prayed to be appointed receiver of said corporation, with authority to take possession of the books and papers thereof, and to levy a sufficient assessment upon the stockholders to liquidate the liabilities of the company. By an order of the judge, indorsed upon the petition, the same was set down for hearing on the first day of the March term, 1875, of the circuit court of Jones county, upon notice to be given to each stockholder and others interested by publication in a newspaper, and by mailing a copy to the reputed post-office address of each stockholder. There is due proof of the publication and mailing of notices as required by the order of the judge, and on the second day of March, no one appearing for the stockholders, default was entered against them, and a

decree entered appointing the said Schoonover as receiver and fixing his bond at \$5,000. Afterwards several assessments upon the stockholders were ordered by the court or by the judge in vacation for the payment of debts of the company, and several reports were made by the receiver and passed upon by the court, from some of which it appears that he had instituted suit against several of the stockholders, including F. E. Hinckley, A. B. Cox, J. Jamison, and George Boone. These proceedings were carried on in the Jones county circuit court, without any appearance on the part of the stockholders, until the third of November, 1879, when George Boone, John M. Whittaker, and Francis E. Hinckley filed their intervening petition, herein alleging that they are stockholders; that certain claims against the company are fraudulent; denying notice of the proceedings; besides numerous other allegations which need not be repeated here. By said petition they pray an accounting, and that the order for assessment upon the capital stock be set aside, as well as the order appointing Schoonover as receiver. Upon the filing of this intervening petition in vacation, and without notice to any one other than that which is afforded by the filing of the same, a petition and bond in this form were filed in the clerk's office of the state court for the removal of the cause to this court. The receiver now appears here and moves to remand.

Miller & Godfrey, for motion.

Geo. W. Kretzinger, contra.

McCrary C. J. As the case stood prior to the filing of the petition of intervention, which is in substance a bill of review, it was not removable under the act of March 3, 1875, because the time for removal had passed. The case had been pending in the state court over three years. The statute requires that the petition for removal shall be filed "before or at the time at which said cause could be first tried, and before the trial thereof." Section 3, act of March 3, 1875. If the cause is removable it must be upon the ground that the petition of intervention, or bill of review above named, is a suit within the meaning of the act. The language of the law is "that any suit of a civil nature, at law or in equity, now pending or here-

after brought in any state court," etc., may be removed. The sole question here is whether the mere filing of a petition under the state practice in a court of the state, without the issuing or service of notice or process of any kind, constitutes a suit within the meaning of the act. I am clearly of the opinion that it does not. Upon general principles I should say without hesitation that process is essential to the institution of a suit. In the very nature of the case it must be necessary to bring the party respondent into court before any step can be taken to change the forum, or for any other purpose affecting his right.

The reasons for this rule are too manifest to require statement here. But it is also clear that the "suit" must exist in the state court according to the state law before it is a suit removable under the act of congress. It must be a suit in which a judgment or decree could be rendered in that court, or some action taken affecting the rights of parties. In other words, it must be a suit commenced in the state court within the meaning of the state law. How, then, are suits to be commenced under that law? By section 2599 of the Code of Iowa, 1873, it is provided that "actions in a court of record shall be commenced by serving the defendant with a notice, signed by the plaintiff or his attorney, informing the defendant of the name of the plaintiff; and that, on or before a date therein named, a petition will be filed," etc. The term "action," under the statute of Iowa, is identical with the word "suit" in the act of congress. This step, or some other equivalent to it, must be taken before a suit is pending for the purposes of the removal act, unless, indeed, service be waived by a voluntary appearance.

The motion to remand is sustained.

BARNEY and others v. WINONA & ST. PETER R. Co.

(Circuit Court, D. Minnesota. December 29, 1880.)

1. GRANT OF LAND TO THE TERRITORY OF MINNESOTA TO AID IN THE CONSTRUCTION OF RAILROADS—INDEMNITY CLAUSE—Act of MARCH 3, 1857—SELECTION OF INDEMNITY LANDS—Act of MARCH 3, 1865—ACT OF JULY 13, 1866.

In Equity.

MILLER, C. J. 1. I am of opinion that, by the true construction of the act of congress of March 3, 1857, (11 St. at Large, 195,) granting lands to the territory of Minnesota, the indemnity clause was intended to include alternate sections within the prescribed limit which had been sold by the United States or lost by pre-emption prior to the date of the grant, as well as such as might be sold between that time and the location of the road. And, without further comment on the cases of *L. & G. R. v. U. S.* 92 U. S. 733, and *B. & M. R. R. Co. v. Same*, 98 U. S. 339, I do not believe the court in those cases intended to establish a different doctrine.

2. I am of opinion that, in the selection of these indemnity lands, there is no restriction to coterminous sections of 20 miles in length of the road except as that may have been affected by the short period between the passage of the act of March 3, 1865, which did appropriate the lands in place to the construction of coterminous road, and the passage of the act of July 13, 1866, which exempted from that rule lands selected in lieu of those deficient anywhere. If any of the lands now claimed were certified or patented to the company for work done during that period, they cannot be treated as patented in lieu of lands deficient in other sections of 10 or 20 miles.

I think the other questions were settled by Judge Dillon, and Judge Nelson can settle a decree accordingly.

NELSON, D. J. I concur.

UNITED STATES v. GILLESPIE and another, Executors, etc.

(Circuit Court, D. New Jersey. April 22, 1881.)

1. EQUITY PRACTICE—FEDERAL COURTS—PLEA IN ABATEMENT.

Under the rules of equity practice, matters in abatement may be pleaded in the federal courts, and need not be set up in the answer.

2. SAME—DEFECTIVE PARTIES.

Under such rules, however, the want of proper parties cannot be pleaded by the defendant, but such defect must be suggested in the answer, as provided by the fifty-second equity rule.—[Ed.]

In Equity.

A. Q. Keasbey, for complainant.

Gilchrist & Parker, for defendants.

BY THE COURT. This is an application to the court by the defendants, executors of Joseph L. Lewis, deceased, for leave to plead various pleas. The matters specified in the notice, and sought to be set up by pleas, merely suspend the right to sue, and are offered to defeat the particular proceeding instituted, rather than to relieve the defendants wholly from the demand, and hence are defences in abatement and not in bar. Such matters are expressly excluded from the provisions of the thirty-ninth equity rule, and we perceive no valid reason why the defendants should not be allowed to plead them, if they prefer so to do, rather than set them up in their answer. The leave, however, does not apply to the alleged want of proper parties to the suit. The fifty-second equity rule makes provision for such a speedy disposition of all suggestions in the answer in regard to defective parties that nothing is gained and no necessity exists for a plea.

The defendants are allowed to plead all matters in abatement, which, in the judgment of counsel, render the action premature under the provisions of the statutes of the state of New Jersey.

SINGER MANUF'G Co. v. HESTER and others.

(Circuit Court, W. D. Missouri, W. D. ———, 1881.)

1. SEWING MACHINE AGENT'S BONDS—CONSTRUCTION OF CONTEMPORANEOUS WRITINGS.

Where there is nothing in the bond or the contract of agency to show that the two instruments were to be taken as part of the same transaction, and both instruments can stand together and have full effect, parol proof cannot be introduced to limit the liabilities of the sureties in the bonds to transactions growing out of the agent's employment under the particular contract alone.

2. RELEASE OF BOND BY AGENT.

The expression of opinion by an agent of the plaintiffs that the execution of a new agreement between the principal and agent, by which the character of the employment was changed, released the sureties, did not amount to a contract of release, in the absence of any authority to make such a contract.

Submitted upon Motion for New Trial.

Action was brought upon a bond executed by defendants to plaintiff in the penal sum of \$2,000, dated the fifteenth of May, 1872, and conditioned as follows: "The condition of the above obligation is such that if the above-bounden Joel Hester, Levi Oren, M. Saville, and Zimri Hester, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, every indebtedness or liability now existing, or which may hereafter in any manner exist, or be incurred, on the part of said Joel Hester to the said Singer Manufacturing Company, whether such indebtedness or liability shall exist in the shape of book-accounts, notes, renewals, or extension of notes or accounts, acceptances, indorsements, or otherwise, (hereby waiving presentments for payment, notice of non-payment, protest and notice of protest, and diligence upon all notes now or hereafter indorsed, transferred, guaranteed, or assigned by the said Joel Hester to the said Singer Manufacturing Company,) then this obligation to be void, but otherwise to remain in full force and effect."

The petition alleges a breach of the condition of the bond, in that defendant Joel Hester did contract certain debts to

plaintiff, which he failed to pay. The answer and amended answer allege that on the sixteenth day of May, 1872, the plaintiff and defendant Joel Hester entered into a written agreement by which said Hester was appointed agent for plaintiff for the sale of sewing machines in and for the county of Holt, in the state of Missouri, said machines to be purchased of the company at Chicago, at a discount of 30 per cent. from Chicago retail prices, and to be paid for in notes payable not more than six months from their date; that said agreement was the only consideration for the execution of the bond sued on, and was part of the same transaction. It is further alleged that on the first day of May, 1873, there was a settlement between the company and its said agent under the agreement aforesaid, and that said agreement was cancelled; and on the said first day of May, 1873, a duly-authorized agent of said company made and entered into a new and different agreement with Joel Hester, again appointing him agent for said company for said county, and by this second agreement the machines were to be consigned to the agent, and not sold to him, (as under the former agreement;) that the second agreement greatly changed, altered, and increased the agent's duties, the terms of the payments and liabilities, without the consent of the sureties on said bond, whereby they were released.

These several agreements are set out in full in the answer. To the original answer, which embodied the foregoing allegations, a demurrer was interposed by plaintiff, and the same was sustained by the court. Therefore the defendant answered further as follows: "And for further defence defendants say that on the first day of May, 1873, said plaintiff and said defendant Joel Hester entered into a new agreement with respect to the matters contained in the writing obligatory set out in plaintiff's petition, and that, in consideration of said new agreement, and that defendant Joel Hester would execute and enter into the same, the plaintiff agreed to and did release defendants from any further liability on said writing obligatory, and did then and there terminate and rescind the same; and defendants aver that no part of the indebtedness

of said Joel Hester to plaintiff was contracted before the said writing was rescinded.

Upon this allegation issue was joined, and, after the testimony was all in on both sides, the court instructed the jury to find for plaintiff. A motion is now made for a new trial upon the ground that the demurrer to the original answer was improperly sustained, and upon the further ground that the issue joined upon the amendment above quoted should have been left to the jury. This motion has been considered by the full bench, at the request of Judge Krekel, who presided at the trial.

Botsford & Williams and Mack J. Leaming, for plaintiff.

L. H. Waters and James Limbird, for defendants.

McCARY, C. J. 1. It is insisted that the bond sued on, and the original contract by which defendant Joel Hester was appointed as agent for plaintiff to sell sewing machines, were entered into at one and the same time, and are parts of the same transaction, and that therefore they should be construed together as constituting one contract, and it is said that, being so construed, the liability of the obligors upon the bond should be limited to the transactions embraced within the contract. That the two instruments were intended to be and were parts of the same transaction, does not appear from anything contained in either. So far as we can gather from the contents of the papers themselves, they were separate, distinct, and independent. It is more than doubtful whether, in such a case, it can be shown by parol that the parties intended anything more or less than appears from the terms of the writing. If, however, it were competent in this way to explain this writing, it certainly would be a violation of long-settled rules to admit parol proof to add to or vary the terms of the written instrument, and this was in effect what was attempted. The bond binds the obligors "to pay, or cause to be paid, any and every indebtedness or liability now existing, or which may hereafter in any manner exist, or be incurred, on the part of said Joel Hester to the said the Singer Manufacturing Company." The contract contains nothing to the contrary of this. The effect is, there-

fore, to show by parol that which is in contradiction of the bond, viz.: that it was to secure, not all debts contracted by Hester of any and every kind, past or future, as it plainly says, but only to secure such as might grow out of the contract of agency. To admit such proof would be to vary by parol the terms of a written instrument. *Bush v. Bank*, 101 U. S. 93; *Sewing Machine Co. v. Webster*, 47 Iowa, 357; *Ins. Co. v. Sedgwick*, 110 Mass. 163; *Frank v. Edwards*, 8 Exch. 214.

2. Even if we read the two instruments together as one contract, the terms of the bonds are not varied or modified. The two instruments can stand together, and the provisions of each can have full effect. Because in the contract Hester was appointed agent for plaintiff, with certain powers, duties, rights, and liabilities, it does not follow that it was not the purpose to make the bond sufficiently comprehensive in its terms to cover that as well as other transactions. The terms of the bond are too plain to be misunderstood. They are not ambiguous, and, in the absence of an allegation of fraud, accident, or mistake, we must give them effect according to their usual and ordinary acceptance. It follows, from these considerations, that the demurrer to the original answer was properly sustained.

3. It only remains to consider the question whether the instruction given by the court to the jury to find for plaintiff was proper. It is insisted by defendant's counsel that the question whether the plaintiff agreed to rescind the bond in consideration of the execution of the second contract by the agent, Hester, should have been submitted to the jury.

There was testimony tending to show that an agent of plaintiff was present at the time of the execution of the second agreement between the company and Hester, and that he expressed the opinion that the effect of it would be to release the sureties of the bond. There was no testimony tending to show that the agent agreed or stipulated that the sureties should be released, nor was there any testimony tending to show that he had any authority from the company to make such an agreement. The expression by the plain-

tiff's agent of the opinion that the legal effect of the new agreement would be to release the sureties on the bond, did not (especially if not acted upon by the sureties so as to change their legal rights) amount to a release. There was, therefore, no evidence upon which a verdict for the defendants could have been sustained. In such a case an instruction to the jury to find for the plaintiff is proper. *Pleasant v. Faut*, 22 Wall. 116.

The motion for a new trial is overruled.

KREKEL, D. J., concurs.

VARY v. NORTON and others.

(Circuit Court, W. D. Michigan, S. D. January 15, 1881.)

1. PROMISSORY NOTE—PRINCIPAL AND SURETY.

Where A., B., and C. are joint and several makers of a promissory note, and after its execution and delivery A. agrees with B. and C. to pay the note, the relation of principal and surety arises between the parties.

2. SAME—SAME—PAROL EVIDENCE.

Parol evidence of such agreement is admissible, and does not tend to contradict the written contract, but shows the changed relation between the makers.

3. SAME—SAME—EXTENSION OF TIME OF PAYMENT.

If the holder, with notice of such agreement, for a valuable consideration, extend the time of payment of the note for a definite period, the sureties, B. and C., are thereby discharged.

4. SAME—SAME—SAME—PAYMENT OF USURIOUS CONSIDERATION.

The payment of a certain sum of money for the extension of time, though regarded as a payment of usurious interest, constitutes a valuable consideration under the statute of Michigan.

Assumpsit. Trial before the Court.

Simonds & Fletcher, for plaintiff.

G. Chase Godwin, for defendants Norton and Lee.

R. W. Butterfield and *J. W. Champlin*, for defendant King.

WITHEY, D. J. The suit is upon a promissory note. Defendants Norton, Lee, and King defend. Judgment by default against all the other defendants. King pleads sepa-

rately that the consideration of the note is in part usurious; that payments of interest have been usurious, and that he is the surety of Norton, and has been discharged from liability by the time of payment having been extended by plaintiff without his knowledge or consent. Norton and Lee join in their defence, which is the same in substance as set up by King. The note was made by all the defendants, at Lowell, in this state, March 27, 1871, by which they jointly and severally promised to pay to William Vary or order, five years after date, \$2,000, with interest at the rate of 10 per cent. per annum, payable semi-annually. All the interest that matured prior to September 14, 1873, was paid to the payee; at or soon after which date the note passed to plaintiff, and he, as holder thereof, has since received the interest to March 27, 1876. All payments of interest have been at the rate of 10 per cent. on the face of the note.

Defendant Norton has, since this suit was commenced, made two payments—one of \$200, June 19th, and the same amount October 8, 1877. The consideration of the note was only \$1,790, money loaned to all the defendants, while \$210 included in the note was usury, to which extent the consideration fails. Plaintiff is chargeable with notice of all the facts. A computation based upon the actual consideration of the note, with interest at 10 per cent. thereon, less payments made by way of interest, shows that the amount remaining unpaid at the date of this opinion is \$1,994.54. On the seventeenth of November, 1873, after the note came into the hands of plaintiff, defendant Norton agreed, for a valuable consideration, with defendants Lee and King, to pay the note. Of this arrangement the plaintiff had seasonable notice. On the fourth of April, 1876, plaintiff and defendant Norton made an agreement by which Norton paid to plaintiff \$460, which met all interest due on the face of the note to that time, the taxable costs of a suit pending against all the defendants on the note, and an excess of about \$15. This latter sum was paid and received as consideration for the agreement of plaintiff then made with Norton to extend the time for the payment of the principal sum to March 27, 1877,

without the knowledge of defendants Lee and King. Defendant Lee had, on the sixteenth of March, 1876, written to plaintiff a letter in which he says: "Mr. Norton's prospects are very good, and just as soon as he can get the money out of his logs he will pay you. I hope you will not make any expense, as it is about impossible to get money here now." The presumption that Norton was pecuniarily responsible and good for this debt in the spring of 1876 has not been rebutted by proof, but that he became insolvent in 1877 appears.

THE LEGAL QUESTIONS.

The case presents, first, the question whether one or more joint and several makers of a note, all of whom are at the making of the debt principal debtors, can change their relation without consent of the creditor, so as to deprive him of the right he had to treat all of them as principal debtors in any transaction touching the debt. This does not involve the question whether parol evidence is admissible to show that one who signed as a joint and several maker was only a surety for his co-maker. On that question the authorities are far from uniform. They are cited in Parsons on Bills and Notes, (2d Ed.) 233-4. See, also, 64 N. Y. 457; 5 Dillon, 140.

The relation of principal debtor and surety arose in this case subsequent to the execution and delivery of the note, and after the plaintiff became the holder of it. The evidence which has been introduced does not, therefore, tend to contradict the written contract, but to show the changed relation between the makers Lee and King, and Norton. The question as to the effect produced upon the rights of the parties under such circumstances has arisen most frequently in reference to partnership indebtedness, when one partner retires and the other retains the business and agrees to pay the firm debts. In this state it is held that if a creditor, after being informed of the new arrangement between the partners, enters into a valid agreement by which the time of payment is extended without consent of the retiring member,

the latter is discharged, on the ground that he had become a surety, and was entitled to the benefit of a surety's rights. *Smith v. Sheldon*, 35 Mich. 42.

The same view was held in *Millerd v. Thorn*, 56 N. Y. 402. See cases cited in the opinions.

But in *Swire v. Redman*, Law R. 1 Q. B. 536, it was held quite the other way. By it the previous case of *Oakley v. Pasheller*, 4 Cl. & Fin. 207, decided in the house of lords, and cited by Judge Cooley in *Smith v. Sheldon*, and by defendants' counsel in this case, to support the rule that an agreement to forbear discharges such retired partner on the ground that he is a surety, is quite explained away, and denied to be an authority for such view. I have not at hand the case of *Oakley v. Pasheller*.

It seems to me that when Norton agreed with Lee and King to pay the note there was created between them the relation of principal debtor and surety, by virtue of which Lee and King became entitled to indemnity from Norton, if payment should be made by them on account of his default, and that they had the right to pay at any time after the debt matured, and bring suit at once against Norton for indemnity. The relation of principal and surety is fixed by the debtors without any action of the creditor. They have a right to arrange such relation between themselves at any time. No change is thereby produced on the contract rights of the creditor; all the makers continue jointly and severally liable as when the note was signed. But when the creditor has notice that, by an arrangement between the makers, one or more of them has become entitled to the rights of a surety, he is as much bound, upon principles of justice, to regard those rights, and to do no act to abridge them, as if such makers had originally signed as sureties. In either case the discharge of the surety is always brought about by the act of the creditor, and not by a change of his contract rights under the note. In reference to accommodation makers, indorsers, etc., the law is too well settled to allow of discussion, that a valid agreement by the creditor to extend the day of payment without their consent discharges them. The reason upon which such

rule rests, and its application to sureties to whom no injury has resulted, might not, at this day, bear the test of justice and common sense; but it is a doctrine too long sanctioned to be questioned in the courts. I cannot regard *Swire v. Redman* as resting upon reasons that ought to control this case.

The other question is as to the validity of the agreement to forbear, viz.: whether the payment of usurious interest constitutes a valuable consideration to uphold the agreement of plaintiff to give time. It is claimed that the \$15 paid for the extension of time was interest for the use of the money represented by the note, and was so much in excess of the highest rate allowed by law. Treating it as a sum paid for forbearance, it is interest. In Michigan, whenever parties so agree, 10 per cent. is collectible; there is no positive prohibition against taking a higher rate, and a higher rate paid cannot be recovered back from the creditor. The statute provides that no contract whereby a greater rate of interest is directly or indirectly reserved or received than is allowed by law, shall thereby be rendered void; but in an action to recover upon such usurious contract, the plaintiff, subject to certain exceptions, shall have judgment for the principal and legal interest only, exclusive of the usury. The courts are nearly uniform in their judgments that a *promise* to pay usurious interest will not uphold an agreement to forbear, because the promise cannot be enforced, though it was held otherwise in *Wheat v. Kendall*, 6 N. H. 504. But when the usurious sum has been paid, learned judges differ whether there is a consideration to uphold the agreement or not.

In New York and Vermont the statute declares contracts tainted with usury to be void; and if usury has been paid, it can be recovered back, with a penalty against the taker. In the former state it was held by two judges, without dissent from the other two, that payment of usury does not afford a consideration. *Vilas v. Jones*, 1 N. Y. 274.

In Vermont, on the other hand, a united court has repeatedly held the other way. *Turrill v. Boynton*, 23 Vt. 142; *Burgess v. Dewey*, 33 Vt. 618. In South Carolina and Missouri such contracts are not void by statute, and in both it

has been held that usury paid will not uphold an agreement to forbear. *Cornwall v. Holly*, 5 Richardson, (S. C.) 47; *Bank v. Harrison*, 57 Mo. 503. Plaintiff's brief also cites 1 J. B. Lee, (Tenn.) 360; 48 Me. 35; 12 Kan. 500.

In Wisconsin it was decided, in *Meswinkle v. Jung*, 30 Wis. 361, that usurious interest paid was not a sufficient consideration; but in a recent case the earlier decision has been overruled. *Hamilton v. Prouty*, 7 N. W. Rep. 659, 3 Wis. 291.

In Kentucky, Indiana, Illinois, and Ohio, the statute, like that of Michigan, does not make the contract void, and the decisions are uniform that usurious interest paid is a valuable consideration and upholds the agreement to forbear. *Kun-ningham v. Bradford*, 1 B. Monroe, 325; 8 B. Monroe, 382; *Cross v. Wood*, 30 Ind. 378; 3 Ind. 346; 15 Ind. 115; 17 Ind. 202; *Whittemore v. Ellison*, 72 Ill. 301; 73 Ill. 170; 78 Ill. 257; *McComb v. Kitteridge*, 14 Ohio, —. See 1 Pars. on Notes and Bills, (2d Ed.) 240.

It is not believed that courts of justice, where the statute declares that usury shall not render a contract void, ought to allow the usurer to plead successfully want of consideration to defeat his agreement, when he has received and appropriated the money of his debtor. It is manifest that the money paid by Norton cannot, under the law of this state, be recovered back by him, and none of the other defendants have any claim upon it. Usury is a personal defence, to be interposed by the debtor, or by those who, by reason of interest acquired in the subject-matter, are entitled to employ his defences. 1 Mich. 84; 11 Mich. 59.

I agree with opinions in some of the cases that he who accepts usury as consideration for his agreement is estopped from claiming want of consideration. It is no offence, and is not wrong *per se*, to take usury, and there is no justice in saying that money, because received as usury, has no legal value. Usury laws are designed as a protection to the debtor class, and not as a shield for the usurer. After Lee and King have pleaded the validity of the agreement to forbear, their right to have the \$15 applied as a payment on the note is

waived, if such right ever existed. But the right exists only when the payment is usury, and I do not see why the \$15 may not be regarded as so much paid by way of interest in advance, rather than have the agreement fail for want of consideration, though I have treated the payment as usury, as was claimed and argued on both sides. Lee's letter to plaintiff, expressing a hope that he would "not make any expense," does not appear to have been acted on by plaintiff; but, I infer from facts in the case, he did make expense by suit subsequent to the date of Lee's letter, which suit was discontinued after the agreement to extend the payment. However that may be, the letter is not consent to an agreement to extend the day of payment for a year, and does not prevent Lee from insisting on the defence that he is discharged.

Judgment of no cause of action will be entered in favor of defendants Lee and King, and in favor of plaintiff, and against all other defendants, for \$1,994.54 damages, and for costs of suit, to be taxed.

WILBUR v. ABBOT.

(Circuit Court, D. New Hampshire. October 12, 1880.)

1. SUIT ON FOREIGN JUDGMENT—ALLEGATION OF SERVICE ON NON-RESIDENT DEFENDANTS AND TERMS OF CONTRACT.

In a declaration on a judgment against A. and B., rendered in the fifth district court of the city of New Orleans, a court of general jurisdiction, it was *held* :

(1) That A. and B. being residents of New Hampshire when the judgment was rendered, failure of the plaintiff to allege that they were duly served with notice of the suit, or that they appeared and answered thereto, made the declaration demurrable.

(2) That failure to set forth the terms, nature, or date of the contract on which such judgment was founded, or the place of making such judgment, was no ground of demurrer.

Motion to Amend Declaration.

Sawyer & Sawyer, Jr., for plaintiff.

S. C. Eastman, for defendant.

CLARK, D. J. In this case the defendant demurred to the plaintiff's declaration, and assigned several distinct causes therefor, three of which apply to both counts in the declaration and two to the second count. Those which apply to both counts are—*First*, that it appears that the said Edward A. Abbot, at the time of the rendition of said supposed judgment, was, and ever since has been, a citizen and resident of the state of New Hampshire; *second*, that it is not alleged, and it does not appear, that the said E. A. Abbot was duly cited to appear and answer to the said supposed suit, nor that any citation, or other legal process, was issued by or from said Fifth district court to the said Joseph S. and Edward A. Abbot, or either of them, to appear and answer to said supposed suit, or that any process was served upon either of them, or that either of them did appear personally or by attorney; and, *third*, that it is not set forth what are the terms, nature, or date of the supposed contract upon which the supposed judgment was founded, or the place at which the said supposed contract was entered.

Those which apply to the second count alone are, in substance,—*First*, that the second count contains several distinct causes of action; and, *second*, that it is so framed that the defendant is unable to take any single and sufficient issue upon it and in answer thereto. These last two causes of demurrer are substantially the same that were allowed upon a former demurrer in this cause.*

The declaration has not been since amended in this particular, and as the court has not seen any reason to change its opinion they must be allowed now. The demurrer must be sustained also, for that there is no allegation in the declaration that either Edward A. Abbot or Joseph S. Abbot was served with any proper process, citation, or notice of the suit in which the judgment was rendered, or that they appeared or answered thereto. Edward A. Abbot is described as of Concord, in the county of Merrimack, and district of New Hampshire. There is no averment that at the time of the rendition of the judgment, and ever since, he has been, and

now is, a citizen and a resident of said state of New Hampshire. Joseph S. Abbot is dead, and there is no distinct allegation of his residence anywhere, but he is described or alleged to be a partner of Edward, and if any presumption arises it is that he resided where Edward did, to-wit, at Concord. This being so, and there being no allegation of service upon either of the defendants, or of an appearance by either of them, the presumption is that the judgment is a nullity, because the process of the court cannot run beyond its territorial jurisdiction. It is contended that in a court of general jurisdiction, as the court of the Fifth district of the city of New Orleans is alleged to be, all things are presumed to be rightfully and legally done, and so if a judgment be rendered against a person it is presumed to be upon a proper notice; and this is so as to all persons within the jurisdiction of the court, when the proceedings are according to the course of the common law. This was expressly decided in *Galpin v. Page*, 18 Wall. 351. But the same case holds that this presumption is limited to the jurisdiction over persons residing within their territorial limits, and over proceedings which are in accordance with the course of the common law. The Abbots residing in New Hampshire when the judgment was rendered, no presumption can arise that they were duly served with notice of the suit in which the judgment was rendered, or that they appeared and answered thereto, for the reason that the Fifth district court of the city of New Orleans is a court of general jurisdiction; nor are the proceedings of said court according to the course of the common law. The only remaining cause of demurrer must be overruled. If the Fifth district court of the city of New Orleans was a court of general jurisdiction, it would not be necessary to state the term, nature, or date of the contract, nor where it was entered into, in order to give the court jurisdiction. Being a personal action it would follow the person.

WILBUR v. ABBOT.

(Circuit Court, D. New Hampshire. December 21, 1880.)

1. AMENDMENT OF DECLARATION.

Although two special demurrers to the plaintiff's declaration for matters of form have been sustained, the court will permit the plaintiff to amend upon terms, it appearing that the case is important and difficult, and that if the amendment was not allowed a part of the plaintiff's remedy would be cut off by an exercise of the discretion from which there is no appeal.

Sawyer & Sawyer, Jr., and Mr. Morrison, for plaintiff.

S. C. Eastman, for defendant.

LOWELL, C. J. This action of debt has been pending several years, and has not yet reached an issue. Two special demurrers to the declaration have been sustained, and delays have happened through other causes. The facts are complicated, and the plaintiff seems to find some embarrassment in setting them out in due form.

Isaac L. Wilbur, the plaintiff, was one of the firm of Wilbur & Borge, of New Orleans, and also syndic for their creditors. Edward A. Abbot, the defendant, was one of the firm of J. S. & E. A. Abbot, of Concord, New Hampshire, and is now the surviving partner and administrator of his father. There were cross-demands between the Abbots and Wilbur & Borge. Wilbur, as syndic, sued the Abbots in the fifth district court of the city of New Orleans, and procured service upon some one who was returned by the officer as J. S. Abbot, one of the partners. It is said that, in fact, it was another Abbot, not connected with the firm. Upon this service Wilbur recovered judgments against both Abbots, by default, for \$23,000 and more.

About the same time the Abbots sued Wilbur & Borge for \$3,200 in the third district court for the city of New Orleans. Wilbur appeared to this suit, and set up, by way of reconvention or set-off, the same debt for which the action was pending in the fifth district court. Thereupon, just after judgment had been obtained in that suit, the attorney for the Abbots objected to the reconventional demand that it was the same

debt already sued on by Wilbur, and for which judgment had been obtained in the fifth district court. The court held this a good objection, and disallowed the set-off. A few days later the Abbots brought a suit of nullity to set aside the judgments against them, on the ground that no service had been made on either of them. The plaintiff, Wilbur, objected that they were estopped from setting up that the judgment was unauthorized, because they had treated it and relied upon it in the other suit as a valid judgment, and had thereupon obtained a certain advantage in that suit.

The estoppel was recognized by the court, and the suit for nullity was dismissed; and the dismissal was affirmed on appeal. *Abbot v. Wilbur*, 22 La. An. 368. The suit now pending here is on this judgment. While it has been pending, a case in the supreme court of New Hampshire by Wilbur against this same defendant, as administrator of his father, has been going on, and the full bench have once decided that the estoppel does not exist, and that the judgment is void. There has been a rehearing of the case, however, and whether this opinion will be changed cannot now be known. Special demurrers having been sustained to the plaintiff's declaration here, he now moves to amend. Upon the face of it, this is a case where two of the highest courts of the states have differed in opinion. I must assume, therefore, that there is much to be said on both sides, and not, as the defendant would persuade me, that it is a wholly groundless and vexatious suit. The special demurrers have been as all special demurrers are to matters of form. I do not feel at liberty to preclude further hearing of a case of such apparent importance and difficulty by denying a motion to amend. Suppose the supreme court at Washington should be appealed to from the judgment of the New Hampshire court, if it is against the plaintiff, or suppose that court should change its opinion, and it should turn out that there is a valid judgment by way of estoppel, if I refuse to allow an amendment, I shall have cut off part of the plaintiff's remedy by an exercise of the discretion which is unappealable, and he must be content to take judgment against the administrator only, and lose that against

the surviving partner. It seems to be a case where the plaintiff should be permitted upon proper terms to state his side of it in his own way, not only once, but twice or thrice, or more. But there should be terms, not only of costs, but the plaintiff should stipulate, if the defendant desires it, that service was not made upon either of the partners. This fact I understand to be conceded, but it may be difficult of proof hereafter. I do not know exactly how the first count stands after the two demurrers. Three proposed counts, purporting to be subsequent to the first, and counting on matters occurring after the original judgment, may be filed; and the plaintiff may file within six days such count on the original judgment as he may be advised: *provided*, that before either of these amendments are allowed as part of the record, the plaintiff shall pay the defendant's costs to this time, and file, if the defendant requires it, the stipulation above mentioned.

UNITED STATES v. AMSDEN and others.

(District Court, D. Indiana. May 4, 1881.)

1. INDICTMENT—VIOLATION OF THE FEDERAL ELECTION—SECTION 5507, REV. ST., & c., SECTION 5 OF THE ACT OF MAY 31, 1870, KNOWN AS THE "ENFORCEMENT ACT," (16 St. 140.)

(1) The fifteenth amendment considered, and *held*, that the power of congress to legislate upon the right of voting at state elections rests upon this amendment, and is limited to prohibitions against discriminations on account of race, color, or previous condition of servitude; and it is further limited to prohibitions of such discrimination by the United States, the states, and their officers, or others claiming to act under color of laws within the prohibition of the amendment.

(2) Section 5507, Rev. St., which is section 5 of the act of May 31, 1870, (16 St. 140,) known as the "Enforcement Act," is *not* authorized by the fifteenth amendment, because it is not so limited. The essential element of discrimination on account of race, color, etc., is wanting. The phrase, "to whom the right of suffrage is guaranteed by the fifteenth amendment," which distinguishes this section from certain other sections of the same act, does not save it from these objections. That phrase is not the equivalent of a phrase limiting the prescribed acts to discriminations on account of race, color, etc. The

section is objectionable for the further reason that it attempts to punish individuals acting on their own responsibility, and not as officers of the United States, or of a state, or otherwise, under pretended authority of laws prohibited by the fifteenth amendment.

Indictment. Motion to Quash.

Chas. L. Holstein, U. S. Att'y, and *L. H. Richardson*, Ass't, for the Government.

T. A. Hendricks, *Lewis Jordan*, and *O. J. Glessner*, for defendants.

GRESHAM, D. J. The indictment contains six counts, all based upon section 5 of what is known as the "Enforcement Act," (16 St. 140; Rev. St. § 5507.) The first count charges that on the fifth day of April, 1880, an election was held under the laws of Indiana for township officers, in and for Addison township, Shelby county, Indiana; that Thomas Wilson, a colored man, was then and there a citizen and an inhabitant of said township, to whom the right of suffrage was guaranteed by the fifteenth amendment to the constitution of the United States, and a legal voter at said election; and that by threats of violence the defendants hindered, prevented, and intimidated the said Wilson from exercising the right of suffrage at said election so guaranteed to him by the fifteenth amendment. The remaining counts need not be noticed further than to say that on the motion to quash they present the same questions as the first. Section 1 of the enforcement act provides that all citizens of the United States, who are otherwise qualified, shall be entitled to vote at all elections, without distinction of race, color, or previous condition of servitude, any constitution or law of the state to the contrary notwithstanding. This section, however, provides no punishment for its violation. Section 2 provides that officers whose duty it is to afford opportunity to citizens to perform an act which by the constitution or laws of any state is made a prerequisite or qualification of voting, who refuse or knowingly omit to furnish the required opportunity on account of race, etc., shall be punished for misdemeanor. Section 3 provides that an offer by any citizen to perform the act which is a prerequisite or qualification of voting shall have the same

effect as performance, and any judge or inspector of election who shall wrongfully refuse or omit to receive or count the vote of such citizen, when furnished by him with his affidavit showing that he has made such offer, shall be punished, etc. Section 4 provides that any person who by force, bribery, threats, intimidation, or other unlawful means, hinders, delays, prevents, or obstructs, or combines with others to hinder, delay, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election, shall be punished, etc. Section 5 reads as follows: "Section 5. And be it further enacted, that if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guarantied by the fifteenth amendment to the constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person from rented houses, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, such person so offending shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than \$500, or be imprisoned not less than one month nor more than one year, or both, at the discretion of the court." Section 6 provides that if two or more persons shall band together, or go in disguise on the public highway, or upon the premises of another, with intent to violate any provision of the act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free enjoyment of any right secured to him by the constitution and laws of the United States, or because of his having exercised the same, such persons shall be deemed guilty of felony.

The fifteenth amendment, which, it is claimed by the government, authorizes the enactment of the fifth section of the "enforcement act," reads as follows: "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of

race, color, or previous condition of servitude. Sec. 2. The congress shall have power to enforce this article by appropriate legislation."

In the case of *The United States v. Reese*, (92 U. S. 214,) it is held that the fifteenth amendment does not confer the right of suffrage, but it invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude; that the power of congress to legislate at all upon the subject of voting at state elections rests upon this amendment, and can be exercised by prescribing punishment only when the wrongful refusal to receive the vote of a qualified elector is because of his race, etc., and that the third and fourth sections of the enforcement act are unauthorized by the fifteenth amendment, and void, because they are not confined in their operation to unlawful discrimination on account of race, etc.

The right to vote in the states comes from the states, while only the right of exemption from discrimination comes from the United States. The prohibition against discrimination is against the United States and the states, and not against individuals. The first section of the amendment is self-executing, and of its own force renders void all legislation, state or national, which discriminates against citizens of the United states on account of their race, color, or previous condition of servitude. States might, however, venture upon prohibited legislation, and it is competent for congress to provide for the punishment of persons who, under the pretended authority of such prohibited legislation, deprive or attempt to deprive citizens of the United States of their right to vote. Undoubtedly, congress may forbid the enforcement of all laws which abridge the rights of citizens to vote on account of their race, etc.; and further provision may be made for the adequate punishment of state or other officers or persons who assume the responsibility of enforcing such laws. But this congress did not do or attempt to do by the fifth section. By this section punishment is declared against those who, in any of the specified ways, endeavor to prevent "any person

from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guarantied by the fifteenth amendment." Punishment is not limited to acts of discrimination on account of race, etc., and we have already seen that the right of suffrage is not guarantied by the fifteenth amendment. It is not an offence against the laws of the United States to prevent a citizen, white or black, from voting at a state election by violence or otherwise. A further element is necessary in such a case to subject the offender to federal jurisdiction and punishment. The violence or other act which is resorted to must be done on account of the voter's race, etc.

In *U. S. v. Cruikshank*, 92 U. S. 542, certain counts of the indictment, which was based upon section 6 of the enforcement act, charge the "intent of the defendants to have been to hinder and prevent the citizens named, being of African descent and color, in the exercise and enjoyment of their several and respective right and privilege to vote." In delivering the opinion of the court, Chief Justice Waite said: "Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it is not so averred. This is a material description of the substance of the offence, and cannot be supplied by implication." The essential element of discrimination on account of race, etc., is wanting, both in the indictment and the section upon which it is based, and for that reason the indictment is bad, and the section is unauthorized by the fifteenth amendment.

It was a local state election at which it is charged that Wilson was prevented from voting. No law of the state is complained of, and no election or state officer is charged with wrong-doing. The allegation is that Wilson, a colored man, and a citizen of the United States, was prevented by the defendants from exercising the right of suffrage at the town-

ship election, and that this right was guarantied to the assailed person by the fifteenth amendment. The federal government can exercise only such powers as have been conferred upon it, and, however reprehensible the acts described in the indictment may be, unless they are done on account of race, etc., and under the authority of legislation which is prohibited by the fifteenth amendment, it is the exclusive province of the state to punish the offenders. The district attorney attaches importance to the language in section 5, "to whom the right of suffrage is secured or guarantied by the fifteenth amendment," and contends that this phrase saves the section from the objection that was found to sections 3 and 4. He further insists that with proper effect given to this phrase the section means that persons who, by any of the methods therein mentioned, prevent or attempt to prevent citizens of the United States from voting at any election on account of race, etc., shall be deemed guilty of misdemeanor. Such latitude of construction is not allowable, but if it were the objection to the section would remain, that instead of being limited in its operation to persons who act or claim to act under prohibited legislation, it provides for the punishment of individuals acting for themselves, irrespective of state laws and in States where there is no prohibited legislation. The motion to quash is sustained.

UNITED STATES *v.* SLATER.

(Circuit Court, D. Texas. April 14, 1881.)

1. ELECTIVE FRAN HISE—RESIDENCE—CONSTITUTION OF TEXAS.

The constitution of the state of Texas provides that "every male person * * * who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; * * * and all electors shall vote in the election precinct of their residence." *Held*, under this provision, that six months' residence within the district would be sufficient to qualify an elector to vote for all state and district officers.—[Ed.]

Motion to Quash Information.

F. W. Miner, for the United States.

J. A. Martin, for defendant.

McCORMICK, D. J. The information in this case charges in substance "that the defendant, on the second of November, 1880, at Marlin, Falls county, Texas, as an officer of a general election, including among other officers to be voted for a representative in congress, did unlawfully and knowingly receive the vote of one J. P. Kramer, a person who was not entitled to vote then and there at said election, because he, the said J. P. Kramer, had not been a citizen of and had not resided in Falls county for and during six months next preceding said election, but the said J. P. Kramer had been a resident and citizen of Robertson county, Texas, down to a period within less than six months prior to said election."

The defendant moves to quash the information on the ground—"First, that the bill charges no offence against the laws of the United States; *second*, because it does not appear from said bill of information that the said J. P. Kramer did not reside for the last six months in the district in which he offered to vote and did vote."

The question raised by this motion is, does this bill of information show that said J. P. Kramer was not entitled to vote at all, at the time and place when and where said election was held? Our present constitution, then in force, declares "every male person, [not subject to certain disqualifications,] who shall have attained the age of 21 years, and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; * * * and all electors shall vote in the election precinct of their residence: *provided*, that all electors living in any unorganized county may vote at any election precinct in the county to which such unorganized county is attached for judicial purposes."

Of our previous constitutions, that of 1845 and that of 1866, the provisions of which were in force from the original formation of the state to the thirtieth of March, 1870,

(besides other qualifications not necessary to mention,) provide that a person who "shall have resided in this state one year next preceding an election, and the last six months within the district, county, city, or town in which he offers to vote, shall be deemed a qualified elector; and should such qualified elector happen to be in any other county situated in the district in which he resides, at the time of an election, he shall be permitted to vote for any district officer: *provided*, that the qualified electors shall be permitted to vote anywhere in the state for state officers."

Here the qualification to vote, so far as residence is an element of it, is manifestly that he shall have resided one year in the state and the last six months within some legally-defined district of the state; but such a residence only qualifies him to vote for state officers and for district officers when voting in some county embraced in the district, as defined by law, in which he resides. It is true that he cannot reside in any district without at the same time residing in some county, (or territory,) organized or unorganized; but it will not be claimed that he cannot reside six months in a district composed of several counties, without residing six months in any one county. And there is no more reason in requiring that the six-months' residence should be in one county in the district to entitle him to vote for state and district officers, than there would be in going further and requiring that the six-months' residence should be in the same city or town in the county to entitle him to vote for county officers; to do either would be to disregard the plain import of the language of the constitution. To my mind it is perfectly clear that from 1845 to 1870 J. P. Kramer would not have lost his right to vote for state and district officers by moving from Robertson county to Falls county within six months next before a general election.

The constitution of 1870 has two distinct and not entirely harmonious provisions on the subject of suffrage—article 3, § 1, and art. 6, § 1. That constitution, however, had the same provision in reference to voting for state officers anywhere in the state, and district officers anywhere in the district of the

voter's residence, as is contained in the preceding constitution, as above shown. The constitution of 1870 also provided that only such as were "duly registered" could vote. Our present constitution provides that "no law shall ever be enacted requiring a registration of the voters of this state," and this provision occurs in a section which says: "In all elections by the people the vote shall be by ballot, and the legislature shall provide for the numbering of tickets, and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot-box; but no law shall ever be enacted requiring a registration of the voters of this state." This section, to my mind, fully explains (if it needed other explanation than is furnished by common observation and experience) the provision heretofore noticed that "all electors shall vote in the election precinct of their residence."

But if, being a citizen of the United States, a residence of one year in the state, and the last six months next before the election within the district, will give him a right to vote in the election precinct in which he resides, for what officers can he vote? Our present constitution provides, (article 6, § 3:) "All qualified electors of the state, * * * who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers." It is clear that a residence in the district for six months does not give the right to vote for city or town officers, unless the residence has been in said city or town; and, by parity of reasoning, such residence would not give the right to vote for county officers unless said six-months' residence had been within the county; and, by a like parity of reasoning, such residence would give the privilege of voting for district officers and for state officers, he having the other qualifications, and having resided the required six months in the district, and the required one year in the state, next before the election, and duly presenting himself in the election precinct in which he resides. And this rational conclusion is made irresistibly strong by the previous uniform practice of permitting

qualified electors of the state to vote for state and district officers, where their residence was not such as to authorize them to vote for county officers at the time and place of their offering to vote.

Our government is founded on the elective franchise. The right to exercise this franchise is declared, defined, and guaranteed by organic provisions superior to any of the departments of the government. The legislature cannot enlarge it or restrict it, and can only regulate it so far as their authority to do so is expressly, or by necessary implication, given in the constitution. Much less may the courts presume to restrict it by construction. On the contrary, the whole spirit of our institutions constrains the courts to give our organic provisions, on the subject of the enjoyment of the right of suffrage, such a construction as will permit the most liberal exercise of this supreme right which is at all reasonably consistent with the terms of those provisions. From a very careful consideration of the subject, I am of the opinion that, for all that is shown in this bill of information, said J. P. Kramer was entitled to vote at the time and place mentioned, and that the motion should be sustained; and it is so ordered.

OBERTEUFFER and others v. HARWOOD, and PETIT, Garnishee.

(District Court, D. Minnesota. ———, 1881.)

1. GARNISHMENT—INTERROGATION OF GARNISHEE.

A garnishee may be required to answer questions tending to show that he was party to a fraudulent assignment by the defendant in the suit.—[ED.]

NELSON, D. J. The garnishee declines to answer certain questions, under the advice of his counsel, for the reason "that the line of inquiry has nothing to do with garnishee proceedings," and the design is "to furnish information bearing on other litigation."

The object of the garnishee proceedings is to reach prop-

erty of the debtor. It is ancillary to the original suit, and is a mode of attaching property to secure any judgment obtained against the principal defendant. A response is required to all questions tending to draw out facts that would disclose property in the possession of the garnishee which might render him liable. To this extent the inquiry may go. Whether the questions propounded are proper or not must depend upon the circumstances of each case, and no particular rules, universally applicable, can be laid down. Every question tending to further the object of the examination is material and proper.

The examination in this case shows a general assignment to the garnishee by the defendant for the benefit of creditors, and he expresses the opinion that he "had at the time of the service of the garnishee summons no property of the defendant in my possession or under my control." Such general answer is not the extent to which inquiry may go with reference to such assignment. The plaintiffs are entitled to answers to all questions which might show the garnishee a party to a fraudulent assignment. If upon "full disclosure" it should appear that the garnishee had no property, money, or effects of the defendant in his possession or control, then, if the plaintiffs desire to attack the assignment for the reason that, in their opinion, it is void, they must pursue the course pointed out in section 174, p. 735, Young's Statutes of Minnesota.

The garnishee must answer the interrogatories. See Drake on Attachments, § 650, and authorities cited.

THE HUDSON.

(District Court, W. D. Pennsylvania. April 21, 1881.)

1. HANDS ON STEAM-BOAT — COMPLETION OF VOYAGE — UNLOADING CARGO.

Libellants were employed as hands on a steam-boat, on a trip from Pittsburgh to Cincinnati and back. They had nothing to do with the navigation of the boat, but the handling of the cargo was part of their employment. *Held*, that they had no right to quit the boat as soon as she was fastened to the wharf at Pittsburgh, but that it was their duty to remain and assist in unloading her cargo.

2. SAME—DEDUCTIONS FROM WAGES.

Held, further, that the respondents could deduct from libellants' wages the reasonable sums necessarily paid for the discharge of such cargo.

3. PRACTICE—PAYMENT TO MARSHAL—PAYMENT INTO COURT—COSTS.

In Admiralty.

Albert York Smith, for libellant.

Isaac S. Van Voorhis, *contra*.

ACHESON, D. J. The amount in controversy here is small, but to the libellants who sue for their wages the matter is of consequence. Moreover, the principle involved is important. The case, therefore, deserves and has received careful consideration. The better opinion seems to be that unless there is some express or implied agreement or established usage to dispense with their further services, seamen are bound to remain with the ship upon the completion of the voyage and assist in the delivery of her cargo, if made in a reasonable time. 1 Conk. Adm. 131; *Dixon v. The Cyrus*, 2 Pet. Adm. 413; *Cloutman v. Tunison*, 1 Sumn. 377.

Here, there were no shipping articles or express contract. The libellants were employed as hands on the steam-boat Hudson, on a trip from Pittsburgh to Cincinnati and back. They had nothing to do with the navigation of the boat, but the handling of the cargo was part of their employment. Under the evidence, I think, they had no right to quit the boat as soon as she was fastened to the wharf at Pittsburgh, but that it was their duty to assist in unloading her. This they ob-

stinately refused to do, and the respondents were compelled to hire laborers to take their places and perform their work in discharging the cargo. The respondents had a right to pursue this course and deduct the necessary sums paid these laborers from the libellants' wages. 1 Conk. 131. After the boat was unloaded a tender was made to the libellants of their wages, less the reasonable sums paid the laborers who performed the libellants' work. The libellants refused the tender, and subsequently filed their libel in this case. Upon service of process the respondents (under protest) paid to the marshal the amount claimed by the libellants, and the costs up to that time, and the marshal paid the money into court. It would have been more regular had the respondents, under leave granted, paid the amount of wages tendered into court at the time their answer was filed, in support of the tender set up in their answer. But, substantially, this was done, for the marshal had paid the money into court before answer filed.

Under the proofs in the case, I am of opinion that the libel must be dismissed, with costs.

THE MARIEL.

(District Court, S. D. New York. January 18, 1881.)

1. PRACTICE—DISMISSAL OF LIBEL—DELAY AFTER ISSUE.

The practice of the court does not authorize the dismissal of a libel for the libellant's delay in bringing the cause to a hearing after issue joined. The claimant has an equal right to move the case.

Rules S. D. N. Y. 136, 123.

In Admiralty.

The libel was filed in 1866 for salvage, and issue was joined. Both parties noticed the cause for trial, and it was placed upon the calendar. It was reserved generally in 1870, and had not been moved again until 1880. The claimants moved to dismiss the libel for failure to prosecute.

George Chase, for the motion.

La Roy S. Gove, *contra*.

CHOATE, D. J. I am satisfied that the practice of this court does not authorize the dismissal of a libel under rule 136* for the libellant's delay in bringing the cause to a hearing after issue joined. The claimant has an equal right under rule 123† to move the case. On inquiry as to the practice I learn that such has been the construction put upon this rule heretofore. Therefore, although there has been delay which would long ago have barred the claim for staleness if suit had not been brought, or entitled these claimants to a dismissal if libellant had not taken out process; yet rule 123 has at all times put it in the power of the claimant to put an end to the delay. Though it seems that similar rules have elsewhere been differently construed, and though the libellant's delay is extraordinary, yet it would be unjust to dismiss his libel consistently with the construction which has hitherto prevailed in this court.

Motion denied.

*RULE 136. If the promovent in a libel or information neglects to proceed in the cause with the dispatch the course of the court demands, the respondent or claimant may have the libel or information dismissed on motion, unless the delay is by order of the judge, or the act of the respondent or claimant.

†RULE 123. So soon as issue is joined the respondent or claimant may notice a cause for hearing on his part, and be thereupon entitled to a decree dismissing the same, with costs, or such other decree as the case may demand, unless the libellant shall also notice the cause for the same time and proceed to trial or hearing, or obtain a continuance by order of the court on proper cause shown.

HUTCHINSON and others v. GREEN and others.

(Circuit Court, E. D. Missouri. April 5, 1881.)

1. INJUNCTION—INTERFERENCE WITH CONTROL OF PROPERTY IN POSSESSION OF STATE COURT.

No injunction will be granted by a United States court to interfere with the possession, control, or disposition of property which is in the hands of a state court of co-ordinate jurisdiction.

2. RECEIVER—POSSESSION OF STATE COURT.

The possession of a receiver appointed by a state court is the possession of the court itself, and the disposition of the property by the receiver is a matter to be ordered by the state court, and will not be interfered with by a United States court by injunction.

3. SAME—FRAUDULENT ASSIGNMENT—INJUNCTION.

Where a state court has appointed a receiver of the property of a corporation, and a fraudulent assignment has been subsequently made of the same, a United States court will not enjoin the assignee from receiving such corporate property from the receiver, in case the state court having control thereof orders it to be turned over to him.

In Equity.

E. T. Allen and *J. O. Broadhead*, for plaintiffs.

James Taussig and *I. A. Madill*, for defendants.

TREAT, D. J. The plaintiffs, citizens of Iowa, bring this suit in behalf of themselves and other stockholders who may join against the defendant corporation, of which they are stockholders, and the assignee of said corporation. The purpose of the suit is to have the assignment made by the corporation, through its then corporate authorities, under the facts and circumstances alleged, adjudged void; and in addition thereto it is prayed that a receiver may be appointed and an injunction against the assignee granted. The present motion is for a provisional injunction against the assignee. It appears that a petition pursuant to the statutes of Missouri was filed in the state circuit court for the removal of certain directors and the president of the defendant corporation, and such proceedings were thereupon had that said removals were decreed; and a special election ordered to fill the vacancies thus created in the board of directors. At the same time said court appointed a receiver of the corporate prop-
v.6,no.9—53

erty and effects. The election, as ordered, was held and confirmed by the court, and a meeting, on due notice of the board as thus constituted, was held December 13, 1880, at which a new president was chosen, etc. Notice was duly given thereafter for the annual meeting to be held on January 19, 1881.

It is averred that for fraudulent purposes a meeting of the board was held, and, by a vote of the majority against the protest of the minority, and against the wishes of a majority of the stockholders, an assignment of the corporate effects, etc., was made January 15, 1881,—four days before the annual meeting. The assignee has given bond under the state statute, and has proceeded, and is now proceeding, to execute the duties imposed upon him by law, subject to the supervision of the state court.

At the annual meeting, January 19, 1881, an election of directors was had, a new president chosen, said assignment repudiated, etc., and the new board instructed to protect the interests of the corporation in such manner as might be deemed advisable.

It is averred that, on investigation made, said corporation has been found solvent, and able, by the administration of its own affairs, not only to meet its obligations, but have a large surplus. The new board authorized and requested its president to proceed in the state court to have the receiver turn over to the corporation its property in his hands on payment of expenses, etc., whereupon the president did so proceed, his petition therefor being accompanied by the written consent of 96 per cent. of the creditors. Said petition was opposed by the assignee and denied by the court.

It is alleged that pursuant to the vote of the stockholders the president had demanded of the assignee that he should reconvey the property to the corporation; that said assignee refused so to do; and that on March 25, 1881, the plaintiffs demanded of said president that "said corporation should at once institute the proper proceedings to enjoin" said assignee from "in any manner interfering with the property and assets of said corporation under said deed of assignment, and to set aside and cancel said deed of assignment, and that

thereupon said Lowery [the president] refused to take further steps," etc.

These latter averments are evidently designed to bring the case within recognized rules as to suits by stockholders when the proper corporate authorities refuse to act in the name of the corporation or permit the name of the corporation to be used as party litigant. Although the averment may be subject to criticism as to its sufficiency, yet as it might be amended, possibly, consistent with facts justifying this form of action, it is thought, for present purposes, advisable to treat the averments as if fully complying with the equity rule.

The allegations of the bill have been thus summarized in order that it may appear with sufficient clearness what the demand is, why the jurisdiction of this court is invoked, and what is the condition of the record in the state court. The bill proceeds as follows: "And your orators, further complaining, say [etc.] that said St. Louis circuit court, in due course of procedure under the provisions of the statutes of the state of Missouri in that behalf, *is about to discharge the said Clubb as receiver of the assets of said corporation defendant, and direct said receiver to turn over said property to the party entitled to receive the same; and that said Charles Green, defendant herein, claims the right and proposes to receive said property from said receiver, and to sell and dispose of the same under said deed of assignment.*" The bill then states that irreparable mischief to the plaintiffs may follow if the assignee proceeds under the assignment.

The prayer is for an injunction to restrain said assignee "from in any manner interfering with any of the property of said corporation; that the assignment may be declared void; that the title of the property be decreed to be in the corporation; that the property be turned over accordingly to the corporation; and that some one may be appointed by this court to demand and receive from said Clubb, receiver aforesaid, when he, the said Clubb, shall be directed by the said St. Louis circuit court to turn over the said property of said defendant corporation, now in his possession, such property, and the same to hold, subject to the order and decrees of this

court," etc. Does not the foregoing analysis of the bill, with its prayers for relief, show most distinctly that this court is asked to enjoin the proceedings of a state court which has custody of the property in dispute, and is proceeding to determine the rights of the several parties in interest? At present the state court has custody, but it is apprehended that it is about to turn over the possession and management of said property from the receiver to a duly-qualified assignee under the state law, over whom it has full supervision. It is not necessary to decide the bald question whether a state assignee who has given bond, etc., in a state court can be interfered with by injunction from this court.

The force of decisions read from the United States Reports is fully appreciated, and the clear distinction observed between judgments in federal courts against state assignees, administrators, etc., and the modes of enforcing said judgments, which, when rendered, are against them in their representative capacity, payable out of assets in their hands. Whatever may be the apparent doubt arising from the cases cited, it seems clear that the case before this court involves no such difficulties; for it is disclosed in the bill that its purpose is to interfere directly with pending proceedings in the state court—practically, to direct what order it shall make as to the future custody or control of property now in the possession of its receiver; or, in other words, that its judgment shall be restricted, in a certain way, so that it cannot adjudge what, to it, law and right may seem to demand. An analysis of the authorities cited will show that in no well-considered case has a United States court ever issued an injunction, directly or indirectly, (except in bankruptcy matters,) to restrain proceedings pending in a state court; nor has it respected any injunction or other mode of interference with its jurisdiction. There has seldom arisen any conflict of jurisdiction since the organization of the United States government, because both federal and state courts have, with rare exceptions, observed the obvious rule of comity, and the federal courts have strictly complied with the provisions of the act of 1793, prohibiting injunctions of the kind claimed here.

It is true, there has been some apparent diversity of views as to concurrent jurisdiction in certain classes of cases, as of administrators, etc., settling estates under local laws. It never has been disputed that a non-resident creditor or distributee could maintain suit against an administrator; but when judgment was had, it had to take its place under the classifications of demands by the local law, instead of being enforced by execution against the administrator or the assets in his hands.

The case of *Toudley v. Lavender*, 21 Wall. 276, sufficiently explains the rule and the reason on which it rests. The following cases, cited by the respective counsel, divide themselves into two classes: (1) Will a federal court interfere by injunction with proceedings in a state court? Under this head it must necessarily be determined whether such matters as are here sought to be enjoined are within the purview of the rule. (2) Whether, despite proceedings pending in a state court, a non-resident cannot sue in a federal court, as in probate matters, and obtain judgment against an administrator, to be collected as stated in 21 Wall., *supra*.

The first proposition is the only one now before this court. A provisional injunction is asked under the facts heretofore recited to prevent the assignee from taking possession of or interfering with the corporate property, even if the state court should, in discharging its receiver, so order. That property is now *in custodia legis*. What the action of the state court may be is not disclosed, and cannot now be known. It remains for that tribunal, without interference from this court, to make such final orders with respect thereto as, in its judgment, the law and facts require. The embarrassment under which parties may labor, if this court does not usurp jurisdiction, are far less than if conflicts of jurisdiction arise. It may be that great loss and injury will result if the corporation is not permitted to proceed with its business affecting the navigation of the upper Mississippi, and that, as urged, this important enterprise may be wrecked, to the detriment of all parties in interest, unless this court intervenes by injunction. That argument cannot prevail against the prohibition

of the statute; nor is it seen how the corporation or plaintiffs would be profited pending this litigation if the assignee is enjoined from acting. It must suffice that, on the record, it sufficiently appears that this court has no power to grant the provisional injunction.

The following are the principal cases cited by counsel, which have been fully examined and considered: *Diggs v. Walcott*, 4 Cranch, 179; *Watson v. Jones*, 13 Wall. 719; *Haines v. Carpenter*, 91 U. S. 254; *Chaffin v. St. Louis*, 4 Dillon, 19; *Dial v. Reynolds*, 96 U. S. 340; *High on Injunctions*, 109, 110, 111; *Erwin v. Emory*, 7 How. 172; *Suydam v. Boyd*, 14 Pet. 67; *Union Bank v. Jolly*, 18 How. 503; *Green v. Creighton*, 23 How. 10; *Payne v. Hook*, 7 Wall. 425; *Toudley v. Lavender*, 21 Wall. 283; *Andrews v. Smith*, 5 FED. REP. 883; *January v. Powell*, 29 Mo. 241.

MCCRARY, C. J., (*concurring*.) The rule is that no injunction shall be granted by any court to interfere with the possession, control, or disposition of property which is in the hands of another court of co-ordinate jurisdiction. The reason for the rule is that its disregard would lead to conflicts between courts of equal authority, and recognizing no common arbiter, which conflicts might lead to the most serious and disastrous consequences. The great importance of the strict observance of this rule in the administration of justice in our state and federal courts has always been recognized in both forums, and for reasons which at once suggest themselves as very cogent.

I am disposed, so far as I am concerned, to uphold it fully, and, even in cases of doubt, to lean towards the adoption of that view which cannot possibly lead to conflict. The *fact* in the present case is that the property is now in the custody of the state courts. The possession of the receiver is the possession of the court itself, and the disposition of the property by the receiver is a matter to be ordered by the court, which has a perfect right to dispose of it as it pleases. That court has control not only of the property, but also of the receiver and the assignee, and in the exercise of the un-

doubted authority it may order the property to be delivered by the receiver to the assignee. It is, indeed, manifest that the apprehension on the part of complainants that the state court will so order, was the moving cause of the institution of the present suit. It appears from the record before us that in the course of the proceedings in the state court, the corporation, the receiver, and the assignee all being present in court and fully heard, that court decided that it is its duty to determine to whom the property shall be delivered when the receiver shall be discharged. In this I have no doubt that court is right. It has jurisdiction of the property and of the parties claiming it. It may be that the assignee is not an officer of the state court in the same sense as if appointed by the court; but it is manifest that, from the moment an assignment is made under the state laws, the assignee is for many purposes subject to the orders of the state court. This is, however, not very material here, for it appears that the assignee has actually appeared in the state court to claim the property, and is now claiming it in that forum, and that the state court has decided that as the record now stands in that court he is entitled to it. It would certainly be a most unseemly interference on our part to attempt at this stage of the proceeding to take the control of the property out of the hands of that court. Suppose we should, by a preliminary injunction, restrain the assignee from acting under the assignment and from taking the property, what right or authority have we to forbid the state court to order the property delivered to the assignee? It is the plain duty of that court, when it comes to discharge its receiver, to determine and direct him as to the disposition of the property in his hands. How can we enjoin the assignee from receiving the property without interfering with a disposition of it which the state court may make and has a perfect right to make in the exercise of its prior jurisdiction? We cannot, of course, say in advance that the state court will or will not order the property delivered to the assignee. If it has jurisdiction to so order, and *may* so order, that is enough. We must recognize and respect the right of the court to deter-

mine the question either way according to its judgment, and not according to ours. If we interfere to determine it in advance, by preliminary injunction, we are plainly attempting to control the action of that court. It is no answer to say that we do not enjoin the court, but only the assignee. It may often happen that an injunction to restrain public officers, or private persons, if granted and enforced, will, in effect, tie the hands of the court under whose orders they are to act. If, for example, a party subject to the jurisdiction of a state court is enjoined by a federal court from obeying the orders of the former, this is an interference with the court as well as with the individual. And the difficulty is not lessened—it is rather increased—by issuing the injunction in advance of the order of the state court, but after it has possession of the subject.

It follows that application for relief by injunction, upon the grounds stated in the bill, must be addressed to the state court, which has possession of the property, control over the several claimants, and power either to order or forbid delivery to the assignee.

BURDICK v. PETERSON.

(Circuit Court, D. Iowa. —, 1880.)

1. RIGHT OF REMOVAL BY INTERVENOR.

Any one coming into a case by petition of intervention has the same right of removal as an original party plaintiff or defendant.

2. PETITION FOR REMOVAL—AVERMENT OF CITIZENSHIP.

The petition for removal of such intervenor, if filed simultaneously with his petition of intervention, is sufficient if it aver the citizenship of the parties in the present tense; for, as to the intervenor, the filing of his petition of intervention is the commencement of the suit.

Motion to Remand.

Action of ejectment, instituted in February, 1876, by the plaintiff, C. W. Burdick, against the defendant, John Peterson, in the district court of Winneshiek county, Iowa. The

defendant appeared in the state court and pleaded the general issue and the statute of limitations. The cause was by the state court continued at the February term, 1876, at the June term, 1876, at the October term, 1876, at the February term, 1877, and at the June term, 1877. At the October term, 1877, George O. Tollman had leave to file petition of intervention, whereby he alleged that he was the owner in fee-simple of the land in controversy, having, after the commencement of this suit, purchased the same at master's sale under a decree of foreclosure. He avers that under said decree and sale he was placed in possession of the land by the marshal, and defendant, Peterson, ejected therefrom, about September 1, 1877. The petition of intervention alleged, in substance, that all the interest, and the possession, of the original defendant, Peterson, had, by virtue of the foreclosure and sale, passed to the purchaser, leaving Peterson thereafter a nominal party only. The petition of intervention was filed October 23, 1877. On the same day the intervenor (Tollman) filed his petition for removal of the cause to the circuit court of the United States. The petition is in the usual form, except that it avers the citizenship of the parties in the present tense. The removal was on the same day ordered by the state court. At the May term, 1880, of this court, the cause was tried, and resulted in a verdict for the defendant. A motion to set aside verdict, and for a new trial, was afterwards made by plaintiff, and is still pending. More recently a motion was made by the plaintiff to set aside the judgment and remand the cause to the state court, upon the ground that "said judgment is void for want of jurisdiction in the court, the cause having been removed from the state court, and it nowhere appearing that at the commencement of the suit the citizenship of the parties thereto was such as to authorize the removal thereof and confer jurisdiction upon this court."

Wright, Gatch & Wright, for motion.

Chas. A. Clark, *amicus curiæ*, *contra*.

MCCRARY, C. J. This court has several times held that the petition for removal, or the record of the cause in the state

court, under the act of 1875, must show the citizenship of the parties at the time of the commencement of the suit.* Assuming the correctness of that general rule, we are to inquire, how does it affect this case? The removal here was upon the petition of Tollman, the intervenor, who became the owner of all the interest of the original defendant by a purchase at judicial sale, made after this suit was brought and had been for some time pending, but before trial. The petition for removal was filed simultaneously with the petition of intervention, and the allegation is that the intervenor was a citizen of New York at the time of filing the petition, or, in other words, at the time he became a party to the suit. Of course, his citizenship before he became a party is unimportant, so far as this question is concerned. If he had the right to remove at all, it was manifestly sufficient to aver the citizenship of the parties at the time that right accrued; that is to say, at the time he became a party to the suit.

The only question to be considered, therefore, is whether a party who in good faith becomes the owner of property pending the litigation concerning the title thereto, in a state court, and who, by proper means, makes himself a party to the cause in such court before trial, is entitled to the benefits of the provisions of the act of March 3, 1875, relating to the removal of causes. In other words, if such a party be a non-resident of the state, has he, when coming into the case by intervention, the same right of removal that he would have had if originally a party plaintiff or defendant? The statute provides that in any suit of a civil nature, brought in any state court, involving over \$500, in which there shall be a controversy between citizens of different states, "either party may remove said suit into the circuit court of the United States," etc. Section 2, Act of March 3, 1875. Can we, with propriety, limit the application of the words "either party" to the original plaintiff and defendant? I think not. The act applies to all *bona fide* litigants in the state courts, whether made parties originally or not. "Either party,"

*See *Beede v. Cheaney*, 5 FED. REP. 388; and *Kaeiser v. Illinois Cent. R. Co.*, *ante*, 1.

whether plaintiff, defendant, or intervenor, may remove a cause by showing the necessary facts. It follows from this that as to an intervenor it is enough to show the citizenship of the parties at the time of his intervention, for, as to him, that is the commencement or bringing of the suit.

But the above-cited section of the act of 1875 further provides that when, in any suit mentioned in the section, "there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district." This clause very clearly applies to a controversy between the original plaintiff and an intervenor who may be brought in in the course of the litigation and before trial. It is enough if the controversy described is in the suit; there is no requirement that it shall be between the original parties. The intervenor became a defendant within the meaning of this clause, and since there was very clearly a controversy between him and the plaintiff, in which the original defendant had no interest, and which could be fully determined as between them, the right of removal existed.

If the petition for removal had not been filed until after the intervention, it would, upon the principle of the cases heretofore decided by this court, have been necessary to aver the citizenship of the parties at the time of the intervention; but inasmuch as the petition to intervene and the petition for removal were filed at one and the same time, I am of the opinion that the use of the present tense in the latter was sufficient.

It is not necessary to determine whether the motion is in time, (having been made after judgment,) since, independently of that question, it must be overruled. So ordered.

Pool, Administratrix, v. THE C., B. & Q. R. Co.

(Circuit Court, D. Iowa. May 11, 1881.)

1. JUROR—MISCONDUCT—PREJUDICE.

Where the natural tendency of what a juror does or says or willingly listens to from others is to bias his mind, or where his misconduct evinces a prejudgment of the case, or ill-will, or passion against the losing party, the inference of prejudice in the true sense inevitably follows, because the verdict cannot be said to be the result of a fair trial.

2. SAME—SAME—SAME.

Under such circumstances the mere facts that the successful party was not in fault, and that the verdict was approved by the court, does not relieve the case from the inference of prejudice.

3. SAME—SAME—SAME.

Where a juror talks outside the jury room about a case pending and undecided before him, he gives the clearest evidence that he is not an impartial and unbiased juror.

4. SAME—SAME—SAME.

The statement of a juror that what he has thus said or heard has not affected or influenced his judgment, is not, under such circumstances, entitled to any weight.

5. NEW TRIAL—MISCONDUCT OF JURORS—PREJUDICE.

Part of the jurors engaged in the trial of a cause passed several consecutive evenings at cards in the room of one of the defendant's counsel, at the hotel where some, but not all, of said jurors were stopping. It appeared that the counsel did not know that these jurors were of the party when he consented that his room should be thus occupied, and that when he discovered that fact he studiously kept aloof from the room every evening until after the card party had dispersed. It further appeared that while the case was yet before the jury and undecided, one of the jurors had talked freely and fully with a third party about the case, and had in such conversation expressed himself to the prejudice of the plaintiff and the plaintiff's counsel. It also appeared that after the jury had retired for consultation that this same juror moved that one of their party act as foreman, and that then, upon motion, said juror was appointed secretary. Held, in view of these circumstances, that the verdict should be set aside and a new trial granted.—[Ed]

Motion for a New Trial.

Hagerman, McCrary & Hagerman, for plaintiff.

H. H. Trimble and J. W. Blythe, for defendant.

LOVE, D. J. This case was tried by jury at the last January term, in Keokuk. The jury gave a verdict for the defendant.

The plaintiff now moves for a new trial. The plaintiff is the widow and administratrix of Erastus P. Pool, deceased, who lost his life in consequence of personal injuries received in attempting to make a coupling while in defendant's service. The action is to recover damages resulting from the injuries thus received. The plaintiff's counsel have, in support of the motion, insisted on many grounds of law and fact which I deem it needless to consider. I shall confine what I have to say to the alleged misconduct of the jury. In this matter some very material facts relied upon for the motion have been disproved. Others have been so far explained by counter affidavits as to relieve the case of the bad aspect in which it might otherwise appear to the court. I shall pass all doubtful or disproved facts without notice, confining my attention exclusively to such as have been clearly proved.

It undeniably appears that a number of the jurors, during the progress of the trial, passed several consecutive evenings at cards in the room of one of the defendant's counsel, at the hotel where some, but not all, of said jurors were stopping. This was a great and reprehensible impropriety, and if it did not clearly appear that the jurors mentioned occupied the room in question without any invitation or inducement from the defendant's counsel, I would not hesitate to set aside the verdict on that ground alone. But it does appear affirmatively, by the affidavits which have been filed, that the jurors occupied Judge Trimble's room under peculiar circumstances, which relieve both Judge Trimble and Mr. Blythe, his associate counsel, from any just censure or responsibility. It is due alike to the counsel concerned and to the court that the circumstances referred to should be stated and placed upon record.

It appears that Judge Trimble and Mr. Blythe occupied separate rooms upon the same floor of the hotel. These gentlemen were closely occupied at Mr. Blythe's room till late in the evening of each day during the trial, examining witnesses, and otherwise preparing their defence. Judge Trimble's room was virtually unoccupied by him till a late hour of the night, and not, it appears, till the card party had dispersed.

The fact that the jurors in question occupied Judge Trimble's room at all is satisfactorily explained.

It appears to have been arranged that some jurors in attendance upon the court should while away their evenings at cards in the rooms of Colonel Milo Smith, who was a juror of the regular panel, but not in the Pool case. It so happened that Mrs. Smith, after some days, reached the city, and it therefore became necessary to abandon the arrangement for meeting at Colonel Smith's rooms.

Thereupon John R. Wallace, who was not a juror in the case then on trial, seeing that Judge Trimble's room was unoccupied, asked him if he had any objection to their card party meeting at his room. He did not state to Judge Trimble who the persons engaged in the card playing were; and the latter, when he gave consent to their using his room, was not aware that any juror in the Pool case was of the party. It clearly and indubitably appears that when Judge Trimble and Mr. Blythe afterwards came to know that some members of the jury in the case then on trial were of the card party, they kept studiously aloof from Judge Trimble's room. It is proved clearly that Mr. Blythe was never in the room at all when the jurors were there, and Judge Trimble was in the room only once during the several nights in question, and then only for a single moment to obtain some needed papers. It appears that neither Judge Trimble nor Mr. Blythe ever, on any occasion during the trial, spoke to any jurors concerning the case, or alluded to the same in their presence except in open court. When Judge Trimble found that some members of the jury in the case were occupying his room, as stated, he was placed in a somewhat embarrassing situation. He had given consent to their occupancy of his room, which was practically vacant. He could not well rescind his assent and order them to vacate the room without danger of giving offence and perhaps prejudicing his client's cause. Both he and Mr. Blythe seem to have done all that could reasonably be expected of them under the circumstances; they kept aloof from the room during its occupancy by the jurors, and abstained scrupulously from making any allusion to the case on

trial to any member of the jury. But the conduct of the jurors themselves was plainly inexcusable. Though it may have been the result of mere thoughtlessness, it was manifestly calculated to bring grave suspicion upon them and upon any verdict they might render. All that the public and the living suitor could know was that several of them who were actually trying the cause were spending night after night in the rooms of the defendant's counsel. How and by what means and under what circumstances they got there; whether with or without invitation; whether with or without purpose respecting the trial; whether to receive or not to receive hospitality,—could not be known or explained to the world without. All this would be matter of mere conjecture, and what conjectures were likely to be made it is needless to say. Even those at the hotel who were informed that these jurors were engaged in an innocent game of cards for amusement might very naturally ask why they did not occupy the room of some one of their own number who was stopping at the house.

The circumstances which have been satisfactorily explained to the court were necessarily unknown to the public; and, although public opinion ought by no means to influence or control the verdict of juries, yet a decent regard to the opinion of mankind is a duty not at all incompatible with the higher and paramount obligation to do exact justice between man and man.

Such conduct as I have referred to on the part of jurors, while trying a cause, merits the most decided reprobation. It tends directly to bring suspicion and discredit upon jury trials, and upon the administration of justice itself. No suitor could feel otherwise than aggrieved at a verdict rendered against him by jurors so demeaning themselves, and a court which should fail to discountenance such conduct when brought to its attention would justly lose the esteem and confidence of all just men. If there was no other fact before me than the misconduct just mentioned, I should, with great reluctance, permit the verdict to stand. The example would, I fear, be infinitely mischievous. I should, therefore, dis-

carding all nice distinctions, feel inclined to put the seal of disapprobation in the most decided manner upon such misconduct by setting aside the verdict.

But there are other facts to be considered. It is shown to my entire satisfaction that Mr. W. H. Hope, a member of the Pool jury, in utter disregard of the instructions of the court, while the case was yet before the jury and undecided, talked freely and fully with Mr. G. W. Meredith about the case, expressing himself to the prejudice of the plaintiff and plaintiff's counsel. Meredith says Hope began the conversation without any question from him, and that he carried it on in a sneering way, saying, among other things, that "Hagerman had the court room full of Keokuk people, who, whenever he said anything, applauded, and that Keokuk thought they had got this thing fixed up very nice," etc. It is needless to say that there was no such thing as applause in the court room. Any such manifestation would have been very quickly suppressed. Hope, in his affidavit, denies this, but I am constrained, nevertheless, to credit Meredith's statement. Meredith, it seems, is a respectable farmer living in Van Buren county. His character is unquestioned. He appears to have no connection whatever with the plaintiff, and no interest in the litigation. What, therefore, could have moved him to fabricate such a statement as he has made and sworn to? What motive—what inducement had he to commit voluntary and gratuitous perjury? Meredith's testimony is positive and affirmative. If false, it was wilfully false. But Hope's denial is negative. He may possibly have forgotten what he did say to Meredith, or, at all events, he may have had but a very dim and indistinct recollection of the conversation. At any rate, Hope, finding his conduct as a juror called seriously in question, had a very strong motive for denying the truth of Meredith's statement, while Meredith had none whatever to make a false affidavit. It may be added that Hope was one of the jurors who, though not stopping at the Patterson House, was present with the rest at the card party there, and that we find him taking a decided and active part when the jury first retired for consultation.

Mr. Carter, a member of the jury, testifies that immediately after the jury retired for consultation, Hope moved that Palmer Clark act as foreman, which was carried. Another gentleman, who was also present with the card party, then moved that Hope act as secretary, which also prevailed. The balloting then commenced. It is remarkable that some one did not move the appointment of a committee to prepare and report a proper verdict to be adopted by the jury. That was all that seemed wanting to transplant the tactics of the veteran politician in full bloom from the caucus to the jury room!

There being no evidence in the affidavits before the court to implicate the defendant in the misconduct of the jury, counsel contends that the court ought not to set aside the verdict, because the misbehavior of the jury is no ground for granting a new trial where the successful party is not at fault, and when there is no prejudice to the losing party. And in this connection the counsel argue that the verdict was clearly right, and that no other verdict could have been rendered upon the evidence. There are certainly authorities to sustain this doctrine, and, with a proper understanding of what constitutes prejudice, I see no good objection to it.

But what is prejudice? Can the court say that where the jury misbehave, so that the losing party has not had a fair and impartial trial, there is no prejudice, because the court may be of opinion that the verdict is right? By no means; because the losing party is not bound to accept the judgment of the court: he is entitled to the verdict of an impartial jury. Suppose, in a criminal case, the jury should commit the fault of receiving information outside of court, and the judge should be of opinion that the conviction was clearly right, could the court pronounce that there was no prejudice to the prisoner, and therefore refuse him a new trial? Clearly not; and yet there is in this respect no distinction in principle between civil and criminal trials. The right to a fair and impartial trial by jury is the same in both. The true idea of prejudice in this connection was this: Was the misbehavior of the juror such as to make it probable that his mind was

v.6,no.9—54

influenced by it so as to render him an unfair and prejudiced juror?

Doubtless there may be cases of misbehavior in which the court could say without hesitation that the mind of the juror could not possibly have been affected by the misconduct imputed to him. Many illustrations may be found in the books of misbehavior without prejudice in this sense. Thus, if, after the jury should find their verdict and seal it up, and before its delivery in court a juror should talk with third persons about the merits of the case, there would be clearly misbehavior, but not prejudice in the proper sense of the word. The court might pronounce without hesitation that the communications made to the juror under such circumstances could not possibly have influenced him in finding the verdict. In such case there would be misconduct without prejudice. But where the natural tendency of what a juror does or says or willingly listens to from others is to bias his mind, or where his misconduct evinces a prejudgment of the case, or ill-will, or passion against the losing party, the inference of prejudice in the true sense inevitably follows, because the verdict cannot be said to be the result of a fair trial. There is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of that right. An unfair trial adds a deadly pang to the bitterness of defeat.

Now, the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are too apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature. Where, therefore, a juror talks outside the jury room about a case pending and undecided before him, he gives the clearest evidence that he is not an impartial and unbiased juror. The very discussion of any matter by a juror elsewhere than in the jury room tends to the forming of false impressions and prejudgments. Nor will it do for a moment to accept the state-

ment of the juror that what he has said or heard has not affected or influenced his judgment.

Almost any juror, when detected in such misconduct and arraigned for it, will disclaim the influence upon his own mind of what he has uttered in violation of his duty. This is human nature. Moreover, few have either the capacity or candor to speak with any reliable certainty of the elements which enter into their own minds in pronouncing a judgment or verdict.

The only safe rule for the court to follow is to form its judgment from the natural and logical consequences of the juror's words and conduct, with little regard to his protestations in exculpation of himself.

All parties, and especially corporations, have a deep concern in keeping juries strictly to the line of duty and propriety. When they deviate from that line there is no longer any security against those malign, extrinsic influences which are sure to pervert and poison the streams of justice.

An order will be entered setting aside the verdict, and granting a new trial; and the court will consider a motion, if made, to rescind the order transferring the case to Keokuk for trial. It is quite evident that there is in that city a deep and all-pervading sympathy for this unfortunate plaintiff, whose home is among its citizens, and in whose sorrows they largely participate. Although this feeling is but natural and by no means discreditable to the citizens of that city, yet the manifestation of it at the trial was so marked and so unusual as to induce a belief that the ends of justice will probably be best subserved by a trial elsewhere.

McCrary, C. J., having been of counsel, took no part in the case.

UNITED STATES v. NATIONAL PARK BANK OF NEW YORK.

(District Court, S. D. New York. January, 1881.)

1. MONEY PAID UNDER A MUTUAL MISTAKE OF FACT—FORGERY OF DRAWEE'S NAME—NEGLIGENCE.

Where the defendant collected from the plaintiff the amount of a draft received by it from another bank for collection, crediting the payment in its account with the latter, which draft was drawn by a paymaster for bounty money, to the order of one D., upon the assistant treasurer of the United States at New York, purporting to be indorsed by him, and was indorsed by the other bank, but not by the defendant, and it was claimed that the fact that D.'s name was a forgery was not discovered by the plaintiff until 10 years afterwards, and not communicated to the defendant until another year had elapsed,—

In an action to recover the money :

Held, that the case is clearly one of payment of money under a mutual mistake of fact, and the plaintiff is entitled to recover, there being no allegation or proof of any loss or damage to the defendant, or of any loss of remedy by the defendant against the bank from which the draft was received, by reason of the delay in discovering or communicating information of the mistake.

That mere negligence, unattended with such loss or damage, cannot impair the equity of the party, paying money under a mutual mistake of fact, to recover it from the other party who received it without giving any consideration therefor.

The rule declared in *Price v. Neal*, 3 Burr. 1354, relating to the acceptance or payment of a draft, the drawer's signature being forged, and cases following it, are now regarded as exceptions to the general rule.

The cases of counterfeit money rest on a different principle, the theory being that delay must necessarily impair the remedies over of the party from whom the money was received.

In this case the defendant has a complete remedy against the other bank upon the plaintiff's recovery in this action. It is immaterial what the plaintiff may do with the money, or what is its duty towards D.

C. P. L. Butler, Ass't Dist. Att'y, for plaintiff.

Barlow & Olney, for defendant.

CHOATE, D. J. This is a suit brought to recover the sum of \$100, paid under a mistake of fact. A jury trial has been waived. There is no dispute as to the facts. One Dunlap made application for bounty money; and in settlement of the claim a paymaster of the United States drew a draft on the

assistant treasurer at New York for the sum of \$100, payable to the order of Dunlap. The defendant received the draft from another bank for collection, indorsed in the name of Dunlap, and also indorsed by such other bank. Without indorsing the draft, the defendant presented it to the assistant treasurer in New York, and received the \$100, on the sixteenth of March, 1869, and immediately thereafter allowed it as a credit in its account with the bank from which it was received. The indorsement of Dunlap's name was a forgery. This is a clear case of payment under a mutual mistake of fact. It is claimed, however, for the defendant that the plaintiff cannot recover on account of its negligence in informing the defendant of the forgery after its discovery that the indorsement was forged. It is claimed that the plaintiff discovered the forgery when Dunlap made another application for the bounty, which he did on the twenty-fourth of February, 1879, and that no information of the forgery was communicated by the plaintiff to the defendant till February 3, 1880. It is not alleged in the answer, nor is there any proof, that the defendant has suffered any loss or damage by reason of this delay, or lost any remedy over against the party from whom it received the draft and to whom it paid the money. But it is contended that such delay is itself negligence of such a character that loss or damage will be presumed to have resulted from it. I think this point is not sustained, either by authority or the reason of the thing. Money thus paid under a mistake of fact is recoverable, because it is paid without any actual consideration, and cannot equitably be retained. The rule is equitable, and may be defeated where to allow the recovery would be inequitable. Negligence in the transaction, unattended with any loss or harm resulting from such negligence to the other party, surely does not impair the equity of the claim against him. Such negligence does not touch the reason of the rule allowing the recovery. If that negligence consists in delay in making the reclamation, with what justice can the party to whom the payment was made say that though he received the money under a mistake of fact, and was bound to return

it a year ago, and could not justly or equitably keep it then, because it did not belong to him; yet, now that the party paying has neglected to let him know of his claim after discovery of the mistake, he can justly and properly keep it? This would be absurd. The authorities are to this effect: that negligence in giving information of the mistake to the other party, with resulting loss of remedy over, is a defence, but otherwise not. The doctrine rests on the duty which the party paying owes to the other to shield him, as far as possible, from loss or damage resulting from the mistake, when he discovers that it is such. If the failure to perform that duty results in loss or damage to the other party, then it is inequitable that he should be obliged to refund. But if that negligence has made no difference to him then it is immaterial. See *Kingston Bank v. Ellinge*, 40 N. Y. 391; *Meyer v. The Mayor*, 63 N. Y. 455; *Pardee v. Fisk*, 60 N. Y. 271; *Union Bank v. Leath Nat. Bank*, 43 N. Y. 456; *Allen v. Fourth Nat. Bank*, 59 N. Y. 19; *Bank of Commerce v. Mechanics' Banking Ass'n*, 55 N. Y. 213; *Continental Nat. Bank v. Nat. Bank Com.* 50 N. Y. 575. These cases, it is true, are mostly cases where the negligence imputed was in making the payment or in not discovering the mistake, but I think the reasoning on which they proceed applies with equal force to cases where the imputed negligence is in giving information after discovery of the mistake. *U. S. v. Union Nat. Bank*, D. C., S. D. N. Y., April 24, 1879; 2 *Parsons' Notes and Bills*, 597. The rule declared in *Price v. Neal*, 3 Burr. 1354, which precludes recovery where the mistake consists in the erroneous admission as genuine, by acceptance or payment, of a draft where the signature of the drawer was forged, and the cases following it, are now regarded as exceptions to the general rule that negligence in making the payment, even where the matter mistaken was peculiarly within the plaintiff's knowledge, or one as to which he had a duty of inquiry, unattended with damage, does not defeat the action. *Allen v. Fourth Nat. Bank*, *ut supra*; and see *Welch v. Goodwin*, 123 Mass. 71. The cases cited by the defendant's counsel, where delay in giving notice that money

received was counterfeit was held fatal to the recovery without actual proof of damage, are quite different in principle from this case. They proceed upon the theory that such delay, from the nature of the case, must necessarily impair the remedies over of the party from whom the money was received, and make it more difficult, if not impossible, for him to trace out the source from which he himself received it, or to find the guilty party and obtain restitution from him. *Pindall's Ex'rs v. N. W. Bank*, 7 Leigh, (Va.) 617, and cases cited; *Gloucester Bank v. Salem Bank*, 17 Mass. 22. In the present case the defendant's answer shows that it received the draft from another bank, and its remedy over will be complete upon the plaintiff's recovery in this action. *Merchants' Nat. Bank v. First Nat. Bank of Baltimore*, 3 FED. REP. 66. I think there was no obligation on the part of the plaintiff to surrender or tender to the defendant, upon the trial, this draft. The possession of it was not necessary to a recovery over. I see no force in the argument, urged by defendant's counsel, that the plaintiff has no just claim, *ex æquo et bono*, because Dunlap cannot sue the government if the plaintiff recovers; nor is there any force in the suggestion that the suit is virtually one for the benefit of Dunlap, and that he has been grossly negligent. What the government may do with the money, or what its duty is towards Dunlap, are matters immaterial. The defendant has received the plaintiff's money, for which it gave no actual consideration, and is bound in law and *ex æquo et bono* to return it. It is unnecessary to consider the point made for the plaintiff that there was no such negligence in this case as the defendant's arguments have assumed, or that, if there was, it would not operate to defeat the action on the general ground that laches is not imputed to the government by reason of the negligence of its officers.

Judgment for plaintiff, with interest and costs.

DAWES & Co. v. PEEBLES' SONS.'

(Circuit Court, S. D. Ohio. March, 1881.)

1. SPECIAL CONTRACT—PLEADING—WHEN PLAINTIFF MAY DECLARE ON COMMON COUNTS.

Where the contract has been performed, or where it has been abandoned by the parties, or put an end to by the defendant, or where it has been only partly fulfilled by the plaintiff and the defendant has accepted and enjoyed the benefit thereof, the plaintiff may elect to bring his action either upon the special contract, or in general *assumpsit*, declaring upon the common counts.

2. GENERAL ISSUE TO COMMON COUNTS IN ASSUMPSIT—DEFENCES UNDER—FAILURE OF CONSIDERATION.

Under the general issue in *assumpsit* upon the common counts, the defendant may show that he was under no legal obligation to the plaintiff for the cause of action set out in the petition, and may also show a total or partial failure of consideration.

3. WHEN DUTY OF COURT TO CONSTRUE CONTRACT—VERBAL CONTRACT—CONFLICT AS TO ITS TERMS.

If the contract between the parties was in writing, it would be the duty of the court to construe it; but if it was a verbal contract, and there is a conflict in the testimony as to its terms, the court cannot construe it, but the matter must be left to the jury, to determine from all the evidence what the contract was.

4. IMPLIED WARRANTY OF MANUFACTURED ARTICLE—FIT FOR USE INTENDED.

Where a vendor agreed to supply or manufacture for a vendee a chattel, without the vendee having an opportunity of examination, the law implies that the vendor undertook that it should reasonably answer the purpose for which it was intended by the parties. Failure in this respect authorizes the vendee to reject within the time specified for its trial.

5. SALE OF MANUFACTURED ARTICLE—ACCEPTANCE.

If, before the expiration of the time fixed by the agreement for its trial, the vendee notified the vendor that he would not accept it, and requested the vendor to take it down and remove it, which he refused to do, the fact of its remaining in the position in which the vendor placed it, and its use by the vendee for a few days thereafter, while waiting for the vendor to take it down and remove it, would not be an acceptance by the vendee.

Action for Goods Sold and Delivered.

*Reported by Messrs. Florian Glauque and J. C. Harper, of the Cincinnati bar.

P. Werner Steinbrecher, for plaintiffs.

Rankin D. Jones, for defendants.

SWING, D. J., (*charging jury*.) The petition in this case alleges that the action is brought to recover from the defendants the sum of \$777.24, the price and value of goods sold and delivered by the plaintiffs to the defendants at their request, as described in an account which is attached to the petition and made a part thereof. The goods described in the account consist of a soda apparatus and tumbler-washer and a quantity of syrups. The answer of the defendants denies that they are indebted to the plaintiffs as claimed in the petition. It also denies the purchase of the goods, and denies each and every allegation of the petition. In an amended answer defendants admit an indebtedness of \$10 for a part of the syrups used by them, and tender that amount, together with the costs, in full satisfaction of all indebtedness from them to the plaintiffs.

From the evidence in the case it appears that the plaintiffs were manufacturers of soda apparatus in the city of Boston, and that the defendants were extensive grocers in Cincinnati, Ohio; that the agent of the plaintiffs residing at Cincinnati entered into negotiations with the defendants, about the tenth of February, 1880, for the sale of a soda apparatus, tumbler-washer, syrups, etc. Several interviews took place between the agent and the defendants, and several letters passed between the plaintiffs and the defendants. The plaintiffs claim that a contract was finally agreed upon between their agent and the defendants, by which they sold to defendants the soda apparatus, tumbler-washer, and syrups for the sum in the petition alleged, upon condition that it should yield an average of five dollars per day to defendants up to the first of June, and that it should work as well as any other apparatus. Plaintiffs further claim that the apparatus yielded to the defendants far more than five dollars per day, and that it was equal in its working to the apparatus of any other manufacturer, and that on the first day of June they demanded of the defendants the amount of the payment which was then to be made, which was refused. Defendants

claim also that there was a special contract in relation to the apparatus, but say that the terms of the contract were that the plaintiff should deliver to them the apparatus, and set it up ready for use; that they were to have until the first of June to try it; and that if it did not yield an average of five dollars per day, or if it were not perfectly satisfactory to them in its workings, they were not to take it. Defendants admit that the amount yielded by the apparatus was above the sum agreed upon, but they say that the apparatus was defective in its materials and construction, and in its working operations, and wholly unsatisfactory to them, and that they received it and it was put up by plaintiffs for them about the twenty-sixth of April; that, finding it defective in the particulars specified, they notified the plaintiffs thereof; and that finally, on the twenty-ninth day of May, they notified the plaintiffs that they would not purchase the same, and requested them to take it away, which they failed to do; that on the first day of June, when plaintiffs' agent called upon them and demanded payment, they refused to pay, and notified the agent to remove the apparatus, which he refused to do; that they kept it in use, subject to the plaintiffs' order, until the twenty-third day of June, when they took it down and notified the plaintiffs thereof; that plaintiffs failing to take it away, that afterwards, on the ——— of August, they boxed up in good order and shipped in good condition the apparatus to the plaintiffs at Boston, where they received and still hold the same.

The plaintiffs admit that the apparatus was received at their establishment in Boston about the first of September, but say it was not received and kept by them as their own property; that it was, when received, in a damaged condition, and not worth over \$300; and that on the twenty-sixth of October they wrote the defendants that they had received and held it as defendants' property. The parties differ as to the terms of the agreement, but both admit that the goods were delivered by the plaintiffs and received by the defendants under a special contract. And the defendants claim that whether the terms of the special agreement be as the plaintiffs claim or as they

claim, that the suit having been brought upon the common counts for goods sold and delivered, and not upon the special contract, there can be no recovery in the case.

The law is well settled that where goods are sold under a special contract, which has not been fully complied with by the plaintiff,—in other words, if it remain executory,—he must sue upon the contract. But if the contract has been executed upon his part, and nothing remains but the payment of the agreed price by the defendant, the plaintiff may bring his action as for goods sold and delivered, declaring upon the common counts, or he may bring it upon the special contract. But if the sale by the terms of the special contract be upon credit, he cannot maintain his action upon the common counts, as for goods sold and delivered, until after the term of credit has expired. And, again, if the contract has been partly performed and has been abandoned by mutual consent, or rescinded or become extinct by the act of the defendant, the plaintiff may bring his action upon the common counts for what he has done under the special agreement; or if that which had been done by the plaintiff under the special agreement had not been performed in the stipulated time or manner, but was beneficial to the defendant and was accepted and enjoyed by him, the plaintiff may declare upon the common counts, and recover the reasonable value of the benefit the defendant has derived from what he had done. 2 Greenl. on Ev. 104; *Cutter v. Powell*, 2 Smith's Lead. Cas. 17 and notes; *Lyon v. Bertram*, 20 How. 149. If, therefore, the evidence shows the existence of either of these, the plaintiff may maintain the action in this form.

It is also contended by the plaintiff that, under the issue as made, the defendant cannot be permitted to show the special contract, or that the goods were not as represented.

The answer is substantially the general issue, and, in strictness, operates only as a denial of the matters alleged in the petition; but this strictness has been so far relaxed that at present, under the general issue in *assumpsit* upon the common counts, the defendant may show that upon almost any ground he was under no legal obligation to the plaintiff for the

cause of action set out in the petition; and, under this plea, he may also show a partial or total failure of consideration. 2 Greenl. on Ev. 135, 136; *Thornton v. Wynn*, 12 Wheat. 183; *Mason v. Eldred*, 6 Wall. 231; *Cutter v. Powell*, *supra*.

It is claimed by the parties in this case that it is the duty of the court to construe the contract in this case. That, undoubtedly, would be so if the contract were in writing; but it is admitted by both parties that the contract between the agent and defendants was not reduced to writing, and the letters which afterwards passed between plaintiffs and defendants was simply the statements of each as to what they understood the terms of the contract to be. True, in the last letter of the plaintiffs they say what they are willing to do, but wind up by saying they will abide by the contract as made by their agent, and to this letter the defendants, by letter, give their assent. So it is a question of fact for the jury to determine, from all the evidence in the case, what was the contract as entered into by the plaintiffs' agents and defendants. If the jury are satisfied, from the evidence, that the contract was that the plaintiffs were to furnish the soda apparatus and tumbler-washer, fixtures, and syrups, and that the defendants should receive from its use five dollars per day until the first of June, and it was to be equal in its workings to that of any other manufacture of like character, and they find from the evidence that it was of that character and yielded that amount, then the plaintiffs are entitled to your verdict for the contract price. Defendants claim, however, that the contract was that it was to yield them five dollars per day, and was to be entirely satisfactory to them to the first of June. If the plaintiffs, without the defendants having an opportunity of examination, agreed to supply them with or manufacture for them a soda apparatus, the law implies that they undertook that it should reasonably answer the purpose for which it was intended by the parties. *Benj. on Sales*, 525, 543. And if, by reason of the character of the materials or the manner of its construction, it did not answer the purposes of a soda apparatus of that character, and the defendants by the contract had until the first day of

June to test it, they had a right to reject it. And if the plaintiffs were notified by them that they did so reject it, the plaintiffs cannot recover. But if they did not notify the plaintiffs until after the first of June that they would reject it, they would be liable to them for the value of the apparatus. If the apparatus, by reason of the defects, was unfitted for the purposes designed for such apparatus, and the defendants, before the first of June, notified the plaintiffs that they would not accept it and for them to take it down and remove it, and plaintiffs refused to do so, the fact that it remained in the position in which plaintiffs had set it up, and was for a short time used by them whilst waiting for them to take it down and remove it, would not make the defendants liable for the apparatus. If the contract was as the plaintiffs claim, and the apparatus was in all respects such as the plaintiffs bound themselves to furnish, and the defendants refused to keep and shipped it to the plaintiffs, and they received it without objection and still retain it, they would not be entitled to recover the contract price, but only the difference between the contract price and the value of the apparatus in the condition in which they received it.

Verdict for defendants.

UNITED STATES v. YATES.

(*District Court, E. D. New York. May 2, 1881.*)

1. INFAMOUS CRIME—FIFTH AMENDMENT.

The crime of passing counterfeit trade dollars is not an infamous crime within the meaning of the fifth amendment of the constitution.

2. SAME—INFORMATION.

A prosecution for such offence, upon information filed by the district attorney, does not, therefore, violate the constitution of the United States.—[Ed.]

Information. Motion in Arrest of Judgment.

A. W. Tenney, for the United States.

Noah Tebbetts, for defendant.

BENEDICT, D. J. Andrew Yates was charged by an information with having passed counterfeit trade dollars with intent to defraud, in violation of the statute of the United States in such case made. Rev. St. § 5457, as amended by act of January 16, 1877, (19 St. at Large, 223.) Upon arraignment he pleaded not guilty. Having been tried and convicted upon such information and plea, he now moves in arrest of judgment upon the ground that a prosecution upon an information filed by the district attorney, instead of an indictment of a grand jury, for the crime charged against him, is in violation of the constitution of the United States. The language of the constitution relied on is found in the fifth amendment, and is as follows: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

The question for determination, therefore, is whether the crime of passing counterfeit trade dollars is an infamous crime within the meaning of the fifth amendment of the constitution. The act of passing counterfeit money, with intent to defraud, was one of common occurrence in England prior to and at the time of the adoption of our constitution, and the character of the act, as fixed by the statutes of England in force at the time of the adoption of the fifth amendment, will furnish a good test by which to determine whether the offence was intended to be covered by the words "infamous crime" in the fifth amendment. By the laws of England from an early period a clear distinction between the act of coining and the act of passing counterfeit coin had been maintained. The former was, by the statutes of Elizabeth, (1 Hale, P. C. 224,) placed in the highest class of crimes, and punished with death, upon the ground that the royal majesty of the crown was affected by such act in a great prerogative of government. 1 Russ. on Crimes, 54. The act of passing counterfeit coin was nothing more than a cheat. Prior to the statute, 15 Geo. II. c. 28, there does not appear to have been any statute of England whereby the mere act of passing counterfeit coin, with intent to defraud, was made a crime.

It was punishable as a cheat at common law, but not otherwise. 1 Russ. on Crimes, 75.

The statute (15 Geo. II, c. 28) made it a statutory offence to utter or tender in payment counterfeit coin in gold or silver, and this statute, after reciting that "whereas the uttering of false money, knowing it to be false, is a crime frequently committed all over the kingdom, and the offenders therein are not deterred by reason that it is only a misdemeanor and the punishment often but small," provides that the offender, for the first offence, shall suffer six months' imprisonment and give sureties for good behavior during six months; that upon conviction a second time for a like offence the offender shall suffer two years' imprisonment and give sureties for good behavior during two years; and that upon a third conviction for a like offence the offender shall be deemed a felon. The provisions of this statute, taken in connection with the prior condition of the law upon this subject in England, are sufficient to show that at the time of the adoption of the fifth amendment the act of passing counterfeit coin was not, by the laws of England, included among infamous crimes. Judging from the law of England as it was understood to be at the time of the adoption of the fifth amendment, the conclusion would therefore be that the act of passing counterfeit coin was not intended to be included among infamous crimes within the meaning of the fifth amendment. The same conclusion is reached by applying the principles of the common law to the act here charged against the defendant. The rule of the common law by which to determine whether an act was infamous or not is given in *U. S. v. Block*, 4 Saw. 214, where it is said that at common law a crime involving a charge of falsehood, must, to be infamous, not only involve a falsehood of such a nature and purpose as makes it probable that the party committing it is devoid of truth and insensible to the obligation of an oath, but the falsehood must be calculated to injuriously affect the public administration of justice. Tried by this test, the act of passing counterfeit coin with intent to defraud is, manifestly, not infamous.

The rule of the common law, as above stated, seems to be

recognized in the statutes of the United States, inasmuch as section 5392 contains a specific provision that a conviction for perjury shall render the offender incapable of giving testimony in any court of the United States; and, so far as I have discovered, a similar effect has not been given by statute to any other crime. But I do not see how the question under consideration must not be considered as disposed of by the decision of the supreme court of the United States in the case of *Fox v. The State of Ohio*, 5 How. 410, where the power of a state to punish the act of passing a counterfeit coin of the United States with intent to defraud was called in question and upheld upon the ground that it was a mere cheat. It will not be pretended, I think, that any act such as the act of passing counterfeit coin is described to be by the supreme court in the case of *Fox v. The State of Ohio*, was, by the common law, deemed to be an infamous crime. The effect of the decision of the supreme court in *Fox v. The State of Ohio* is in nowise modified by the subsequent decision of the same court in *U. S. v. Marigold*, 9 How. 264, where the power of the United States to punish the act of passing counterfeit coin of the United States was upheld upon the ground that the court traced "both the offence and the authority to punish it to the power given by the constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation;" for in *U. S. v. Marigold* the court is careful to re-affirm, in express terms, all the doctrines declared in *Fox v. The State of Ohio*. So that according to the laws of the United States, as expounded by the supreme court of the United States, the act of passing counterfeit coin with intent to defraud is, in its nature, nothing more than a mere cheat. Authority in the United States to punish this form of cheating results from the obligation cast upon the United States by the grant of power to coin money, but the character of the act is not changed thereby. It is still a cheat and nothing more.

It is pushing the argument too far to say that the supreme court, in upholding the authority of the United States to pun-

ish the passing of counterfeit coin upon the ground that the effect of such an act was to interfere with the government in the discharge of its obligations under the constitution, has placed the act of passing counterfeit coin in the same category with coining, and that, because coining was infamous at common law, passing counterfeit coin must now be held infamous. This mode of reasoning would lead to the conclusion that all crimes punishable by the United States are infamous, and must be prosecuted upon the indictment of a grand jury; for, except in a single instance, (Const. art. 1, § 8,) all the power to create offences possessed by the United States is a resulting power derived from the obligations created by the constitution.

The act of passing an unstamped check is plainly enough an interference with the government in the discharge of its obligation to levy and collect taxes, and probably nothing else. But a prosecution of such an act by information has passed under the consideration of the supreme court without objection, (*United States v. Isham*, 17 Wall. 496,) and many offences of a character to touch the prerogatives of the government have been prosecuted by information, both in the circuit and district courts of the United States. *U. S. v. Maxwell*, and cases cited, 3 Dill. 275. Before dismissing the subject it is proper to add that it is not seen that the question under discussion is affected by the circumstance that the statute creating the offence prescribes imprisonment at hard labor, and does not declare the offence to be infamous or a felony. The omission to declare the crime a felony furnishes, no doubt, a reason for considering the crime to be a misdemeanor, but the fact that the offence is a misdemeanor is not conclusive of the question whether it be an infamous crime or not; nor can the crime be held infamous from the fact that it is punishable by hard labor.

By the statutes of many states any crime punishable by hard labor is a felony, but no such test is furnished by the statutes of the United States. Indeed, a provision declaring that "a felony, under any law of the United States, is a crime punishable with death, or by imprisonment at hard labor,"

and that "every other crime is a misdemeanor," submitted by the revisers of the statutes in their draft, was rejected. See 2 Draft Rev. St. 2561, title, "Crimes."

In early times the character of the crime was determined by the punishment inflicted, but in modern times the act itself, its nature, purpose, and effect are looked at for the purpose of determining whether it be infamous or not. *The People v. Whipple*, 9 Cow. 708; 2 Starkie on Ev. part 4, p. 715. And while under our constitution the legality of an information may be affected by the nature of the punishment to this extent, that by virtue of the fifth amendment an information is not legal in any case where the punishment is death,—and such was the punishment prescribed for the act of passing counterfeit money by the act of 1790, repealed by the act of March 3, 1825,—in all other cases the legality of a prosecution by information, not prohibited by positive statute, must, as I conceive, depend upon the judicial question whether the nature, purpose, and effect of the act made criminal is such as to bring it within the meaning of the term "infamous crime," as that term was understood at common law, and cannot be determined by reference to any declaration on the subject contained in the statute, or by the nature of the punishment which the statute prescribes. Any other rule would place it in the power of the legislature to nullify the provision in the constitution by declaring that no offence against the United States shall be an infamous crime.

But if the rule be otherwise, and it be competent for the legislature to designate what offences against the United States are infamous crimes, or to make a crime infamous by declaring it to be a felony, the result here would be the same, because the statute is silent on the subject; and, in the absence of some positive provision, the presumption is against an intention to make an offence an infamous crime. *U. S. v. Cross*, 1 McArthur, 149. For these reasons I am of the opinion that the prosecution of the accused for the crime of passing counterfeit trade dollars by an information instead of by an indictment is legal, and that judgment may properly be pronounced upon the verdict rendered.

In order to prevent the delay attendant upon a removal of the case to the circuit court by writ of error, under the statute of March 3, 1879, (20 St. at Large, 354,) Judge BLATCHFORD consented to listen to the argument made upon this motion, and I am authorized to say that he concurs in this opinion.

NOTE. See *United States v. Baugh*, 2 FED. REP. 784; and *United States v. Coppersmith*, 4 FED. REP. 198.

UNITED STATES v. VEAZIE.

(Circuit Court, D. Massachusetts. May 2, 1881.)

1. INTERNAL REVENUE—MANUFACTURED TOBACCO—RETAIL DEALER—
REV. ST. § 3363.

Section 3363 of the Revised Statutes provides, *inter alia*, that “no manufactured tobacco shall be sold or offered for sale unless put up in packages and stamped as prescribed in this chapter, *except at retail, by retail dealers, from wooden packages stamped as provided in this chapter.*”

Held, that a retail dealer who, in the course of his business, sells at retail tobacco taken by him from a wooden package duly put up and stamped, whether taken at or before the sale, does not violate this section.—[Ed.]

Indictment.

U. S. Attorney, for the United States.

Prentiss Cummings, for defendant.

NELSON, D. J. This is an indictment under Rev. St., § 3363, charging the defendant with selling manufactured tobacco not put up in packages and duly stamped. The facts not being in dispute, the defendant submitted to a verdict of guilty, subject to the opinion of the court whether the offence charged in the indictment was proved.

Section 3363 is as follows: “No manufactured tobacco shall be sold or offered for sale unless put up in packages and stamped as prescribed in this chapter, *except at retail, by retail dealers, from wooden packages stamped as provided in this chapter*; and every person who sells or offers for sale any snuffs, or any kind of manufactured tobacco, not so put up in pack-

ages and stamped, shall be fined not less than \$500, and imprisoned not less than six months nor more than two years."

It appeared at the trial that the defendant was an apothecary, and also sold cigars and tobacco at retail. He had paid a special tax as a dealer in tobacco, and purchased plug tobacco in wooden packages, put up and stamped as required by the internal revenue laws. It was his practice to store the original packages in a room in the rear of his shop, and from time to time, as his business required, to cut plugs from the packages and expose them for sale in a show-case in his front shop, the package itself remaining in the back room. At or about the time charged in the indictment he sold one of the plugs from his show-case to one Walsh.

It is clear that these facts bring the defendant within the excepting clause of section 3363, unless, as the government contends, a sale at retail must be made directly and literally from the package, and a sale of a part after it has been separated from the whole is unlawful. That this is not the meaning of the clause is plain. Its evident purpose is to permit the retail dealer, whose business is to make single sales in quantities less than the whole package, to break the package and sell to his customers in the lesser quantity. The statute prescribes no time when the separation of the lesser from the larger quantity shall be made. It does not declare that the separation shall take place only at the instant of time when the separated piece is sold. All it says is that it shall be *from* the package, the evident inference being that it may be taken from the package for sale at retail before the sale. How long before, it does not attempt to prescribe. The court cannot supply what the statute omits to provide, and by sheer force of construction add an element which is wanting.

A statute so highly penal as this should be construed with at least reasonable strictness, and ought not to be extended by implication so as to include acts not plainly within its terms. The interpretation insisted upon by the government is a forced one, and is not warranted either by the letter or spirit of the enactment. A retail dealer who, in the course of his

business, sells at retail tobacco taken by him from a wooden package duly put up and stamped, whether taken at or before the sale, does not violate this section.

Verdict set aside and a new trial granted.

In re HYDE, Bankrupt.*

In re KING, Bankrupt.

(District Court, S. D. New York. February, 1881.)

1. BANKRUPT LAW OF 1841—RULE 30—ADJOURNING QUESTION TO THE CIRCUIT COURT.

The provision of the bankrupt law of 1841, that "the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined," (5 St. 445,) does not preclude the district judge from exercising that discretion, even though the question has been submitted and he has given an opinion thereon, no final order or decree having been entered. The opinion is subject to revision and correction until the order or decree has been entered.

This interpretation accords with the thirtieth rule in bankruptcy, (Act of 1841).

The importance of the question is a sufficient reason for adjourning it to the circuit court, even though the point is not deemed doubtful by the district judge.

(For opinion of the court referred to see 3 FED. REP. 839.)

G. F. Betts, for respondent.

W. A. Butler, for petitioner.

CHOATE, D. J. The court, having heard these cases and delivered an opinion therein on all the points and questions submitted in September last, (see 3 FED. REP. 839,) the respondent, Chapman, now moves the court that certain questions arising therein be adjourned into the circuit court. There has been great delay in making the application. The entry of the final orders to carry into effect the opinion of the court has been postponed, on the application of the respondent.

*See *ante*, 587, for opinion of Judge Blatchford upon adjournment of the question to the circuit court. The publication of the present opinion has been delayed by the illness of Judge Choate.

ent, to enable him to make a motion for a rehearing, which motion has been made and denied. The respondent has also been very dilatory in submitting to the court the amendments to the proposed orders, which he obtained leave of the court to submit. These laches on the part of the respondent is urged by petitioner's counsel as a reason for denying this application, but, in view of the great importance of the case to the parties, I do not feel at liberty, on this ground, to deny the application, although, so far as it is granted, it will be upon the condition that hereafter there be no delay.

It is urged on behalf of the petitioners that it is now too late to adjourn questions into the circuit court, because the statute does not allow this to be done after the decision of the questions by the district court, and that in this case the questions have been decided by the district court. The provision of the statute is: "The district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined." 5 St. 445. I think the circumstance that the point or question has been submitted to the district judge, and that he has expressed his opinion thereon, does not preclude him, if in his discretion he thinks it proper and just to do so, from adjourning questions into the circuit court to be there heard and determined. Indeed, it must often happen that until the district judge has heard and examined the whole case he cannot properly or intelligently determine what points or questions are so important or so difficult as to call for the exercise of this discretionary power. Points which upon the pleadings or upon their first statement may appear difficult or important, may be found upon examination to be settled by authority; or, though difficult as abstract questions, wholly unimportant, because not decisive of the matter to be determined. Until an order or decree is entered it cannot be said, in the strict sense of the word, that there is a decision. The court may, notwithstanding its opinion delivered in the cause, enter an order or decree not altogether in conformity therewith. Until the entry of an order or decree its opinion is subject to revision and correc-

tion. This statute, indeed, is capable of a construction that the question or point adjourned is to be heard and determined in the circuit court, and not to be previously heard in the district court, or any decision made thereon in the district court. I think, however, this would be too strict and narrow a construction, in view of the purposes intended to be subserved in this provision of law.

The thirtieth rule in bankruptcy is as follows: "If a point or question arises which is deemed by the district judge difficult and important, the same will be adjourned to the circuit court by order, without motion by either party. Either party desiring such adjournment, and, previous to a final decision or decree in the district court on the point, producing the certificate of counsel that the point is difficult and important, may move the adjournment, and the court, in its discretion, may allow the same on such motion; but, unless both parties concur in the application, the adjournment will be at the expense of the party moving it." This rule seems to show that the power of the district judge to adjourn questions into the circuit court was understood to be cut off only by the entry of a decree or final order by the district court. And such seems to have been the practical application of the statute and the rule in the case of *Mott*, (unreported).*

The first question which I am asked to adjourn into the circuit court is, in substance, "Whether the district court has power, sitting in bankruptcy, and exercising the jurisdiction conferred by the bankrupt law of 1841, by summary order to set aside, and order to be surrendered and cancelled, deeds given by the official assignee which were improvidently, irregularly, or without due authority executed by him, or which were procured to be executed by imposition and fraudulent practices upon the court, or which were designedly so drawn as to be grants in excess of, or varying in material particulars from, the orders of the court under which they purport to be executed, while the same are still in the hands of the party by whom they were so procured from the assignee, and who had notice of said irregularities and defects, and who gave no

* *Ante*, 685.

value therefor except certain sums paid to the official assignee as fees, upon the petition of a party not a creditor of the bankrupt, and having no interest in the matter except that he is in possession of land, claiming title thereto, and that he has been subjected to litigation, or is threatened with litigation, in respect to said land, based upon the deeds sought to be avoided. Whether this power, if it can be exercised at all, can be exercised after the discharge of the bankrupt, and when there are no longer any known assets to be distributed among creditors."

When these petitions were first presented to the court the respondent, Chapman, appeared and moved that the petitions be dismissed on the ground that the court had no power to set aside the deeds upon these petitions. After argument of this motion it was withdrawn, without prejudice to the same point, to be taken up on a hearing on the merits, and the respondent answered. The point was again taken on the final hearing. It was insisted that if the petitioners have any title to relief they must proceed by plenary suit by bill in equity, and not summarily. This point was decided against the respondent. However clear it may seem to me that the court has power to avoid the deeds by summary order, the importance of the question is such that I think I ought to adjourn it into the circuit court.

In *Nelson v. Carland*, 1 How. 265, Justice Catron says: "The district judge may adjourn into the circuit court any question, whether he has or has not doubts regarding its decision. Its importance is a sufficient reason." I think this question is of sufficient importance to be so adjourned.

The next question that I am asked to adjourn into the circuit court is whether the sale to Hallihan was valid, and prevented a conveyance subsequently to Hunt. This point is not important because not decisive of the case. It is true that as against Chapman, who acted under the name of Hunt, and was not a *bona fide* purchaser for value, the prior sale to Hallihan, which had never been set aside, is made one of the grounds for holding the deed to Hunt improvidently and illegally given, but the decision does not rest wholly or chiefly

on the validity of this prior sale. The particular point now asked to be adjourned, as to the effect on the sale to Hallihan of the notice of sale being only a six days' notice, whereas the rules of the court required a fourteen days' notice in case of the sale of real estate, was not taken in the argument in this court; nor was it decided that the interest of the assignee, if he had any, which was sold to Hallihan, was real and not personal. This point of the validity of the sale to Hallihan does not touch the principal grounds of the decision,—the fraudulent practice on the court by Chapman, and the fraudulent variance between the orders and the deeds, as to which no questions are asked to be adjourned into the circuit court.

I am asked to adjourn the further question whether the recitals in the deeds given by the assignee are not conclusive in favor of the respondent under section 15 of the act, which provides "that a copy of any decree in bankruptcy, and the appointment of assignees as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt sold and conveyed by any assignees under and by virtue of this act, and that such recital, together with a certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy or assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully, and to all intents and purposes, as if made by such bankrupt himself immediately before such order." I cannot perceive that there is any question of difficulty or importance, as bearing on this case, growing out of this section. This section provides what shall be recited in an assignee's deed, and the effect of that recital as evidence. It also provides what shall be the effect of his deed as a conveyance. It has no relation to the effect of fraud or imposition practiced by a party obtaining a deed from an assignee, and certainly cannot be construed as taking away any power that the court may have to annul such a deed; nor can it be construed as

having any effect except in case of a *bona fide* purchaser from an assignee.

The first question will be adjourned into the circuit court, to be there heard and determined at the expense of the respondent, Chapman: *provided*, however, that it be there brought on for hearing upon such day as shall be appointed by the circuit judge, upon one day's notice of the application to him for setting the same down for hearing.

MATTHEWS *v.* CHAMBERS and another.

(Circuit Court, W. D. Pennsylvania. January 15, 1881.)

1. RE-ISSUE No. 2,386, AND LETTERS PATENT No. 44,684, for improvements in bottle-stoppers, *construed*, and *Matthews v. Shoenberger*, 4 FED. REP. 635, *followed*.

2. SAME.

A patent for an improved bottle-stopper, consisting in a compressible valve, capable of being forced into the bottle through the mouth, and incapable of easy passage through it in the opposite direction, and a bottle having the interior of its neck so shaped as to present a bearing surface or seat with which the valve is brought into close contact to close the bottle, *held, not infringed* by bottles closed by a simple wooden or glass plug, which easily passes through the neck of the bottle in either direction, but acts as a stopper when pressed or drawn into a rubber ring placed in the neck of the bottle after the plug is inserted in the bottle.

3. SAME.

Held, further, that a claim in such patent for "the entire stopper of such a length that it cannot turn over in the body of the bottle," was not to be construed as embracing all manner of internal bottle-stoppers having the specified length, irrespective of other distinguishable characteristics and modes of operation.—[Ed.

In Equity.

Arthur *v.* Briesen and James I. Kay, for complainant.
Bakewell & Kerr, for respondents.

ACHESON, D. J. This suit is for the alleged infringement of two patents for improvements in bottle stoppers. The first of these patents is re-issue No. 2,386, issued October 30, 1866, to the plaintiff as assignee of Albert Albertson, to

whom the original patent issued August 26, 1862. The stopper described in this patent consists of a disk valve which seats against the inside surface of the bottle at the lower end of the neck, and is fixed to the lower end of a central stem which extends in an outward direction up into the neck. The valve is held in place by a spiral spring fastened to the stem and supported by a shoulder or other device in the neck of the bottle. The valve is formed of a flexible disk of rubber, or other yielding substance, interposed between two rigid disks, the under one being just large enough to pass through the narrowest part of the neck of the bottle, and the upper one small enough to permit the flexible disk to fold up around it as the valve is pushed down into the bottle. The stopper is put into the bottle by inserting it in the neck and pressing the spring until the valve has passed through the neck. When once in the bottle the valve cannot be withdrawn, for the lower rigid disk being nearly the size of the opening in the neck, the flexible disk effectually prevents its coming out, and the greater the upward pressure the closer and tighter is the stopper. The stopper is closed by the upward pressure of the spiral spring, and is opened by a downward pressure on the upper end of the stem.

The claims of this patent alleged to have been infringed are as follows: "*First*. A stopper which is inserted through the mouth of the bottle or other vessel, and which, when inserted, is closed perfectly tight against a seat formed within the bottle itself, by pressure in an upward direction; *second*, a prolongation of such stopper by means of a central stem, rod, or other extension of the stopper, in an outward direction, beyond the seat of the valve, for the purpose of affording facility for opening the stopper, or that of receiving the upward pressure of a spring, or other means of drawing the valve to its seat, substantially as herein specified."

The second patent is No. 44,684, issued October 11, 1864, to J. N. McIntire, as assignee of Albert Albertson; and assigned by McIntire to the plaintiff, April 3, 1865.

The stopper described in the patent is also inserted through the mouth of the bottle, and forced down into the bottle. It

consists of a stem having thereon secured or formed a cup-shaped valve, opening upward, of gutta percha, or other elastic or yielding substance, so constructed that it can be brought into close contact with a suitable bearing surface or seat on the interior of the neck of the bottle. The position of the valve on the stem is such as to allow the upper end of the stem, or knob of the stopper, to protrude a short distance beyond the mouth of the bottle when the valve is in its seat. The bottle is opened by pressure, or a blow with the hand upon the protruding knob, the stopper falling down into the bottle. The stem is of such a length that the stopper cannot turn over in the bottle, but must always present itself right end foremost to the neck of the bottle. The manner of closing the bottle is to invert it, when the stopper falls into the neck—the valve resting in its seat. When the bottle contains aerated liquid, the upward pressure of the gas seats the valve tightly and keeps the bottle closed. But, in bottling still liquids, the valve is brought tightly into its seat by pulling the protruding knob of the stopper, and the compression of the valve in the tapering portion of the neck will insure the retention of the stopper when the bottle is turned up again.

In his specification the inventor states that he prefers to make the valve (as shown in the drawings) conical, with the upper end hollow, and to provide the interior of the neck of the bottle with a shoulder, "for in this form of valve and seat the stopper is readily forced down through the neck, but in being forced up against its seat or shoulder, the valve, *c*, will be bulged or upset, and cannot be forced out." Other forms of valve, it is stated, may be used. "The valve, *c*, and neck of the bottle should, however, be so shaped (even when the shoulder, *x*, is employed) that the former will be compressed in the taper portion of the neck before it comes against the shoulder, in order to create friction sufficient to prevent the falling in of the stopper when still liquors are contained in the bottle."

The claims of this patent are in these words: "*Firstly*, the employment in combination with a bottle, having the interior

of its neck suitably formed to receive it, of a stopper constructed to operate in closing and unclosing the bottle, substantially as described; *secondly*, I claim so constructing the valve, c, and the mouth of the bottle, that the former may be readily forced through the latter in one direction, and incapable of easy passage through it in the opposite direction, as hereinbefore described, for the purpose set forth; *thirdly*, I claim making the entire stopper of such a length that it cannot turn over in the body of the bottle, as and for the purpose set forth."

The bottles manufactured by the defendants are designated in the evidence as the "Christin bottle" and the "Kelly bottle." The Christin bottle has a loose internal tapered wooden-plug stopper, which is of smaller diameter than the interior of the neck of the bottle, and will pass freely in and out of it. In the inside of the neck of the bottle, just within the lip, an annular groove or recess is moulded. The stopper having first been inserted in the bottle, an annular rubber collar or seat is expanded into the said groove. This being done, the stopper cannot pass out, but, when the bottle is inverted, seats itself in the rubber ring. The top of tapered end of the stopper has a pair of sockets on opposite sides to receive the lower ends of a pair of tongs, which grasp and draw the stopper tightly into place in the rubber seat. To open the bottle the stopper is pushed inwardly. It is of sufficient length to prevent it from turning over in the bottle.

The Kelly bottle has in the inside of the mouth an annular groove, in which there is inserted a rubber ring, similar to that of the Christin bottle, and for the same purpose. The stopper, however, is a pear-shaped glass plug. It is readily inserted through the mouth of the bottle before the rubber ring is put in, but the lower part of the neck of the bottle is so constructed that the plug cannot pass down into the bottle. The glass plug falls into its rubber seat when the bottle is inverted, and is tightly held there by the upward action of the gas in the liquid below. The bottle is opened by pressing the plug downward.

The construction of the plaintiff's patents was brought in

question in the case of *Matthews v. Shoenberger*, 4 FED. REP. 635. In that case, Judge Blatchford, speaking of the first patent, says: "The first claim is not a claim to any mechanism; but, if not a claim to a function, is a claim to a mode of operation. It amounts to a claim to inserting a stopper through the mouth of a bottle, and then pressing it upwards till it is closed tight against a seat inside. It seems to be intended to cover every form of stopper, and any form of mouth, and any means of pressure, and any arrangement of seat. As a claim thus broad it cannot be sustained. It must be limited to the mechanism described, having the mode of operation described. The stopper, to infringe, must be inserted through the mouth of the finished bottle substantially as the plaintiff's is, and the pressure upwards must be made by mechanism and not by the gas in the liquid. * * *

As to the second claim the specification says: 'I am aware that an internal flap, valve, or door, acted upon by a spring, float, or counterweight, has been used to close the orifice of vessels, as an ink holder or oil vessel, to keep out dust, etc., but intended to give way on a very slight pressure. Such arrangement, however, could not make a stopper which would be air-tight.' This statement shows that it was not new to press from without an internal valve closing the orifice of a vessel, such closing taking place by the action of a spring, and such pressure being made against the outer surface of the valve to open the orifice. This being so, the second claim of the re-issue must be limited to substantially such a form of stopper as the specification shows, with substantially such a prolongation or extension in an outward direction, if, indeed, the claim can be made at all, in respect to the facility afforded for opening the stopper, in view of the admitted prior arrangement."

Speaking of the first claim of the second patent, Judge Blatchford says: "The claim is to a mechanism, to a physical structure, to the combination of a bottle which has a neck, and has the interior of its neck suitably formed to receive the stopper, with a stopper constructed as stated in the claim. This means a stopper constructed as described,

and which, by reason of its construction, operates as described, in connection with the neck of the bottle, in closing and unclosing the bottle. The claim is not to the employment in a bottle of a given mode of operation resulting from any structure of stopper. Such a claim would not be a claim to a process. It would be a claim to a function of mechanism, aside from the structure of such mechanism. It would not be a valid claim. The proper construction of the claim is that it is a claim to the employment, in combination with a bottle having the interior of its neck suitably formed to receive such stopper, of a stopper constructed substantially as described."

It was held, therefore, in *Matthews v. Shoenberger*, that an internal gravitating bottle stopper, consisting of a glass marble working inside the neck of the bottle, precisely after the manner of the glass plug in the Kelly bottle, and seating against a rubber ring in the neck by the upward pressure of the gas in the liquid, is not an infringement of either of the plaintiff's patents.

It seems to me the construction which Judge Blatchford has given to the plaintiff's patents is the only one consistent with their validity; for, unless limited to the exact construction of the devices they show, I do not see how it is possible to save the patents at all, in view of the prior state of the art. An internal closing stopper for bottles was by no means a new thing at the time of Albertson's earlier invention. This clearly appears from the patents in evidence, to a few of which a brief reference will be made.

Thus, Blyth's English patent of 1857 shows an internal stopper for bottles which is inserted through the mouth of the bottle, and is closed against a seat within the bottle by the upward pressure of a helical spring, which is situated beneath the lower end of a movable vertical stem, which acts beneath the center of the closing valve; and the stopper is opened by outward pressure upon the valve.

The Zouf French patent of 1844 shows a stopper which is inserted through the mouth of the bottle, and which, when inserted, is closed tightly against a seat, which is within the

bottle, by upward pressure of a spiral spring working around an upwardly projecting stem; and the stopper is opened by pressure applied to the top of the stem. And an internal bottle stopper, having substantially the same arrangement and method of operation, is shown by the Nouvean English patent of 1858. If it be true that in the patents just referred to the valve does not close against a seat formed in the *substance of the bottle itself*, it is equally true that in the Christin and Kelly bottles the plug does not seat against the substance of the bottle, but against an elastic packing or detachable rubber seat enclosed in a recess within the neck of the bottle. As bearing more particularly upon the claims of the plaintiff's second patent, the McCallum English patent of 1862 is worthy of especial observation. The specification, after stating that the invention is "peculiarly suitable for aerated liquids," describes the bottle as "formed with a construction in the neck, A, presenting internally a kind of valve seat, B." This valve seat does not differ from the plaintiff's shoulder, *x*, and is for the identical purpose; for it is stated that after the bottle is filled, and the stopper drawn "into its place against the seat, B, in the neck, A, of the bottle, * * * the internal pressure keeps the stopper securely in its place."

The stopper is described as "a kind of valve," consisting "of a washer made of a flexible material, such as leather, or caoutchouc, and fixed on a short spindle or center in such a way, that, on being pushed into the bottle in one direction, the washer bends inwards towards or against the upper part of the center or spindle, and passes easily, whilst on being moved in the other direction the washer expands and cannot be forced or drawn through the contracted neck of the bottle." In closing the bottle the stopper is grasped and drawn into its seat by an instrument inserted into the mouth of the bottle for that purpose. The bottle is opened by pushing the stopper inwardly, and the stopper "remains in the bottle, and can be used over again repeatedly."

If it be conceded that the plaintiff's patents were not fully anticipated, it is, nevertheless, clear to my mind that the dif-

ferences between his devices and those shown by the earlier patents are less marked and substantial than are the differences between the defendants' devices and those of the plaintiff.

The defendants do not use the mechanism described in the plaintiff's first patent, nor anything that is the equivalent thereof. They do not employ a spiral or any spring, nor a disk valve. Neither in form nor in mode of operation is either of their stoppers at all similar to the stopper described in that patent.

The distinguishing and indispensable features of the plaintiff's second patent are a compressible valve, capable of being forced into the bottle through the mouth, and incapable of easy passage through it in the opposite direction, and a bottle having the interior of its neck so shaped as to present a bearing surface or seat with which the valve is brought into close contact to close the bottle. These characteristics are wholly wanting in the defendants' devices. The defendants use no valve. Their bottles are closed by a simple wooden or glass plug, which easily passes through the neck of the bottle in either direction, but acts as a stopper when pressed or drawn into a rubber ring placed in the neck of the bottle after the plug is inserted in the bottle.

In my judgment the defendants' devices differ essentially from, and in point of simplicity and utility are vastly superior to, those of the plaintiff. It is true that the defendants' stopper is of sufficient length to prevent it from turning over in the bottle, and therefore it is contended infringes the third claim of the second patent. But to provide a valve with a stem of such length as to prevent it from turning over in its chamber, so that it shall always present itself right to the orifice it is to close, was certainly an old and well-known expedient. In view of this fact, and looking to the terms of the claim, it must, I think, be restricted to the form of stopper shown by the specification. "*In all instances, however, the stopper is formed as shown, and is forced into the bottle as seen in figure 2,*" is the language of the specification; and the language of the claim is, "making the entire

stopper of such a length," etc. Manifestly the specified length is but a single feature of the stopper. The claim, therefore, is not to be read as embracing all manner of internal bottle stoppers having the specified length, irrespective of other distinguishable characteristics and modes of operation. Construed so broadly, the claim could not be sustained. *Matthews v. Shoenberger, supra.*

I am of opinion that no infringement of either of the plaintiff's patents has been shown.

Let a decree be drawn dismissing his bill, with costs.

PUTNAM and another v. HOLLENDER and another.

(Circuit Court, S. D. New York. February 10, 1881.)

1. PLEADING—JOINT AND SEPARATE INFRINGEMENT—PROOF.

In a suit for infringement the bill alleged that the defendants had "jointly and collectively, and also separately," used and sold bottle-stoppers containing the patented invention. *Held*, (although no joint sale or use was shown,) as the bill was framed to recover for separate infringements, and was not demurred to on that ground, and the case had gone on under that issue, that the plaintiff could maintain the suit as a suit against each defendant separately.

2. COMBINATION—TRANSPPOSITION OF PARTS—INFRINGEMENT—IMPROVEMENT IN BOTTLE-STOPPERS.

Re-issued letters patent granted to Karl Hutter, June 5, 1877, for an improvement in bottle-stoppers, claimed, *inter alia*: "(1) The combination, substantially as before set forth, of the compound stopper, the yoke, the lever, and the supporting device on the bottle, by means of three pivotal connections, upon which the said members can be turned relatively to each other without disconnecting either one from the other." *Held*, that the mere transposition of the places of the yoke and the lever did not constitute such a substantial difference in respect to the invention, or the mode of operating the combination, as would avoid infringement.

3. LICENSE—CONSTRUCTION.

A patentee authorized a licensee to use and manufacture his invention "for his own proper business," to a specified amount per annum. *Held*, in the absence of affirmative authority, that a sublicense was not authorized by such agreement.

4. PRIOR INVENTION—BURDEN OF PROOF.

Where prior invention is set up as a defence in a suit for infringement, the burden of proof rests upon the defendant, and every reasonable doubt should be resolved against him.

5. SAME—EVIDENCE.

The invention or discovery relied upon as a defence must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant.—[Ed.]

Arthur v. Briesen, for plaintiffs.

George W. Yeaman, for defendants.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent granted to Karl Hutter, June 5, 1877, for an "improvement in bottle-stoppers," the original patent having been granted to Charles De Quillfeldt, as inventor, January 5, 1875. The specification of the re-issue says:

"The object of this invention is to permit bottle mouths to be readily and securely closed and readily opened, without disconnecting the stopping devices from the bottle. To this end my invention consists of a certain new elastic stopple, and of certain new combinations of devices, of which the following are the principles, viz.: A compound stopper composed of a rigid annular member adapted to withstand the strains incident to closing the bottle, and an elastic disk intervening between the said rigid member and the bottle mouth so as to prevent the contact of the rigid member with the glass of the bottle, and to close the bottle mouth tightly, the disk having an upwardly projecting stem which extends through the rigid member; an elastic and flexible disk-stopper of small thickness compared with its diameter, and provided with a stem, said stem serving to connect said elastic disk-stopper to a yoke or frame by which the same is attached to the bottle; a yoke or bail adapted to straddle the bottle mouth and constitute one of the devices by means of which the elastic stopper is connected with or linked to the bottle, so that said stopper remains connected with the bottle although the bottle mouth is open; a lever which is connected with said yoke or bail, and by means of which the elastic stopper can be forced downward and compressed to close the bottle mouth tightly. The lever constitutes one of the de-

vices by means of which the compound stopper is connected with the bottle, whether the bottle mouth is closed or open, and the pivots and eyes of the lever constitute parts of two pivotal connections, whereby it may be connected with the compound stopper and with the bottle mouth, so as to turn or swing for the purpose of utilizing its lever property. The several combinations of the above-mentioned devices, which constitute the invention, are set forth in the claims at the close of this specification. In order that they may be fully understood, I have represented in the accompanying drawing, and will proceed to describe, the mode in which I embodied them for practical use at the time of filing the application for my original patent. Figure 1 represents a front view of the bottle-stopping devices in the positions severally occupied by them when the bottle is closed. Figure 2 is a vertical transverse section of parts of the same. Figure 3 is a side view of the devices showing the compound stopper disengaged from the bottle mouth, but still connected with the bottle. The compound stopper represented in the said drawing is composed of the rigid cap-piece, E, and the elastic member, D, which is made of rubber or other elastic material. The elastic member, D, has the form of a disk of small thickness compared with its diameter, so that it is flexible, and may readily bend to conform to the form which may be given to the cap-piece. It is also constructed with a central shank or stem, e, which is perforated transversely near its upper end so that a wire may be passed through it to prevent its withdrawal from the cap-piece, E, which is perforated centrally to permit the stem of the rubber disk to be passed through it. The lower surface of the disk, D, is of larger diameter than the opening in the mouth of the bottle to which said disk is to be applied. The compound stopper, composed of the rigid cap-piece and elastic member, is connected with the bottle by means of a lever, B, and yoke, C, which are connected with each other with the bottle and with the compound stopper by pivotal connections, so as to permit the lever, yoke, and stopper to be turned relatively to the bottle, and to each other, for the purpose of forcing the compound

stopper downward to close the mouth of the bottle with the force incidental to the power of the lever, but also to maintain the connection between the compound stopper and the bottle when the latter is opened, in which case the compound stopper is still linked to the bottle through the lever and yoke. The pivotal connection between the yoke, C, and the lever, B, is formed by the bent ends of the yoke entering eyes, *bb*, of the lever, B. The pivotal connection by means of which the connected lever and yoke are held to the bottle is formed by the bent ends of the lever entering as pivots into the eyes, *a' a'*, of a band, *a*, which is secured to the exterior of the bottle neck, and the pivotal connection by which the connected yoke and lever are held to the compound stopper is formed by the central part of the yoke, which passes through, and turns as a pivot in, the transverse perforation of the stem, *e*. The yoke, C, is constructed to straddle the bottle mouth, and the lever, B, is constructed of yoke form to straddle the bottle neck; one set of the pivotal connections being at its ends, while another is intermediate between its ends and its handle end, *d*. The intermediate pivotal connection is at a sufficient distance from the end pivotal connection, and from the handle end of the lever, and so placed that when the lever has been turned against the bottle to the position to hold the compound stopper so that it closes the bottle mouth, the intermediate pivotal connection is at that time turned past the vertical plane passing through the pivotal connections with the bottle and with the compound stopper, and the compound stopper is thereby locked in its closed position as represented at figure 2. The closing of the bottle is performed by guiding the stopper by hand to the bottle mouth, with the elastic member beneath the cap-piece, and by turning the lever downward and inward, or towards the bottle, to its locked position. The opening of the bottle is performed by turning the lever outward or away from the bottle, so as to raise and liberate the compound stopper, which may then be further moved by hand."

There are nine claims in the re-issue, as follows:

"(1) The combination, substantially as before set forth, of

the compound stopper, the yoke, the lever, and the supporting device on the bottle, by means of three pivotal connections, upon which the said members can be turned relatively to each other without disconnecting either one from the other.

"(2) The combination, substantially as before set forth, of the compound stopper, the lever, and the yoke, by means of two pivotal connections, upon which the said three members can be turned relatively to each other without disconnection, and the pivotal connection of the lever to the bottle, substantially as set forth.

"(3) In combination with a bottle, the flexible elastic stopper disk, whose lower surface is larger than the opening in the mouth of the bottle, and which is provided with an upwardly projecting stem or shank, substantially as before set forth.

"(4) The combination of a perforated rigid cap-piece with the flexible elastic stopper disk, whose lower surface is larger than the opening in the mouth of the bottle, and which is constructed with a stem of reduced diameter, said stem being passed into the perforation of the cap-piece, substantially as before set forth.

"(5) The combination of the rigid cap-piece with the flexible elastic stopper disk, constructed with a laterally perforated stem, through which a wire is passed above said cap-piece to confine said cap-piece to said disk, substantially as specified.

"(6) The combination, substantially as before set forth, of the flexible elastic stopper disk, constructed with a perforated stem, the perforated cap-piece and the yoke, which is passed transversely through the said stem for the purpose of preventing the withdrawal thereof from the cap-piece.

"(7) The combination, substantially as before set forth, of the yoke and the lever, which are directly connected, one with the other, by a pivotal connection, the lever being constructed with end pivots to enable it to be connected pivotally with the supporting device on the bottle.

"(8) The eccentric lever, B, made with two pivotal connections, the one joining it to the bottle, the other to the pivoted

stopple, so that by vibrating said lever on its connection with the bottle it will carry the stopple towards or away from said bottle, substantially as specified.

"(9) The combination of the pivoted bottle-stopper with the yoke, C, neck ring, a, and eccentric lever, B, the said yoke and eccentric lever being pivoted together and arranged so that the stopper is forced into the bottle by swinging the handle part of the lever against the side of the bottle, substantially as herein shown and described."

1. The bill alleges that the defendants have "jointly and collectively, and also separately," used and sold bottle-stoppers containing the patented invention. The answer admits that the defendant Fritz Hollender has used bottle-stoppers containing the patented invention, as a member of the firm of Hollender & Co., composed of himself and Emil Hollender. It avers that the defendant William Hollender has been book-keeper and salesman of said firm. It admits that the defendant William Hollender has sold bottle-stoppers containing the patented invention on his individual account, and not in connection with the other defendant, or with the firm of Hollender & Co. Although no joint sale or use is shown, yet as the bill is framed to recover for separate infringements, and was not demurred to on that ground, and the case has gone on under that issue, the plaintiff can maintain this suit as a suit against each defendant separately. It is shown by the proofs that the defendant Fritz Hollender used stoppers like plaintiffs' Exhibit No. 8; that the defendant William Hollender sold like stoppers; and that the defendant Fritz Hollender has made, used, and sold stoppers like plaintiffs' Exhibit No. 11. This makes it necessary to determine whether Exhibits No. 8 and 11 infringe the plaintiffs' re-issue.

Exhibit No. 8 is identical in construction with the drawings of the plaintiffs' re-issue. It therefore infringes all the claims.

In Exhibit No. 11 there is a compound stopper, made of a rigid annular cap and an elastic disk intervening between it and the bottle mouth; a yoke or bail straddling the bottle mouth and serving to connect the stopper with the bottle even

when the stopper is out of the bottle mouth; a lever connected with the yoke, and by means of which the stopper is forced down and compressed to close the bottle mouth tightly; and the lever and the yoke are connected with each other, with the bottle, and with the stopper by pivotal connections, so as to permit the lever, the yoke, and the stopper to be turned relatively to the bottle and to each other, so as to force the stopper down to close the mouth of the bottle with the force incidental to the power of the lever. In the plaintiff's re-issue the neck band is pivoted to the lever, the lever to the yoke, and the yoke to the stopper. In Exhibit No. 11 the neck band is pivoted to the yoke, the yoke to the lever, and the lever to the stopper. In both there are four elements,—the neck band, the yoke, the lever, and the stopper,—each connected to one of the other three by a pivotal connection, there being three pivotal connections. The neck band and the stopper are in the same place in both structures, each at one end of the series of four. The places of the yoke and the lever are transposed in the two structures. In the plaintiffs' the lever is next to the neck band, and the yoke is next to the stopper. In Exhibit No. 11 the yoke is next to the neck band and the lever is next to the stopper. But this is the only difference, and it is no difference of substance in respect to the invention and to the mode of operation of the combination of the four elements, in its entirety, as such combination exists in both structures. That is the combination covered by the first claim of the re-issue. The same considerations show that the combination covered by the second claim of the re-issue exists in Exhibit No. 11. Exhibit No. 11 is known as the Von Hofe stopper.

2. The answer sets up that the re-issue covers more than was described in the specification of the original patent, and is not for the same invention. There is no evidence to this effect, and there does not appear to be any ground for the assertion.

3. The answer avers that the plaintiffs' bottle-stopper was, before De Quillfeldt applied for his patent, invented by one Emil Hollender, or by him jointly with De Quillfeldt, and

not by De Quillfeldt alone. The patent was applied for November 30, 1874. Prior to that and on November 24, 1874, De Quillfeldt and Emil Hollender executed an agreement in writing, under seal, as follows: "This agreement and license made this twenty-fourth day of November, 1874, by and between C. De Quillfeldt, of the first part, and Emil Hollender, of the second part, witnesseth, that whereas, invention made by C. De Quillfeldt, party of the first part, for which application has been made this day to secure letters patent of the United States of America, for an improved 'bottle-stopper lock,' and whereas the party of the second part, Emil Hollender, desires to acquire license and privilege with exclusive right to manufacture and sell said bottle-stopper lock, in consideration whereof, he agrees—*First*, to pay C. De Quillfeldt, party of the first part, the sum of seventy-five (75) dollars, cash in hand, receipt of which is acknowledged below; and pay all charges for letters-patent application; *second*, the party of the second part also agrees to pay the party of the first part a royalty of five per cent. (5) on each and all such stopper-locks, at the value of four (4) cents a piece, for a period of seventeen years from date; *third*, the party of the second part further agrees to use due diligence and exertion in making known said bottle-stopper, and keeping the market fully supplied to the best of his ability; *fourth*, any extra service rendered on the part of the party of the first part in favor of the party of the second part after this date will not be included in the above agreement."

Emil Hollender became the subscribing witness to the specification signed by De Quillfeldt on his application for the patent. On the ninth of February, 1875, Emil Hollender not having paid the \$75 to De Quillfeldt, De Quillfeldt repaid to Emil Hollender \$60 which the latter had paid as expenses of obtaining the patent, and the latter gave up to the former his copy of said agreement, and they regarded it as cancelled. On the tenth of February, 1875, De Quillfeldt assigned to Karl Hutter, one of the plaintiffs, all his right, title, and interest in and to the patent. On the eleventh of February, 1875, Emil Hollender executed to De Quillfeldt a general re-

lease of all claims and demands, "particularly releasing all claims which I may have by reason of a certain agreement entered into between myself and C. De Quillfeldt, on the twenty-fourth day of November, 1874, for the sole manufacture and sale of the improved 'bottle-stopper lock' invented by said C. De Quillfeldt." As a consideration for the execution of that release, Hutter, who was advised that he ought to obtain from Emil Hollender a paper to secure his title, paid to Emil Hollender \$150, and they executed an agreement, under seal, of which the following is a copy, on the thirteenth of February, 1875:

"This agreement, made and entered into this thirteenth day of February, 1875, between Karl Hutter, party of the first part, and Emil Hollender, party of the second part, witnesseth: (1) That whereas the said party of the first part has purchased from a certain C. De Quillfeldt a certain patent for 'bottle-stopper,' and the said party of the second part has had an interest therein, now, therefore, it is agreed, by and between the parties hereto, that the said party of the first part hereby allows and privileges the said party of the second part to use the said patent and manufacture the said stoppers, as many as he, the said party of the second part, may need and use for his own proper business, to the amount of 100 gross a year. (2) For which consideration, as above stated, the said party of the second part waives all further interest in said patent."

Notwithstanding the state of facts appearing by the foregoing papers, the sole invention by Emil Hollender, or the joint invention by him and De Quillfeldt, is insisted on. This is based on testimony given by Emil Hollender. But it is shown, by absolute and entirely clear proof, that De Quillfeldt was the inventor, and the sole inventor. An erroneous view is taken of the testimony of Goepel. He does not say that De Quillfeldt and Emil Hollender each said that they invented it jointly. He says that, "on inquiring who was the inventor, they both replied they had invented it." This means that each said, "I am the inventor." This is what Emil Hollender himself says was said to Goepel.

4. The answer sets up that while the defendant Fritz Hollender was carrying on the business of bottling and selling ales, beer, etc., under the name of Hollender & Co., Emil Hollender became a partner with him, under the name of Hollender & Co.; that Emil Hollender at that time held said agreement of February 13, 1875; that when Emil Hollender became a member of the firm of Hollender & Co. he put into it, as his share of its capital stock, the right to use the said bottle-stoppers, so granted to him by Hutter, and that the only use by the firm of Hollender & Co. of the patented bottle-stoppers was a use by virtue of the said right; that the said firm of Hollender & Co. thus has the right to use the patented stoppers to the extent of 100 gross per year; and that such use has never been to that extent.

On the thirteenth of February, 1875, Emil Hollender had a bottling business of his own. He gave it up in April, 1877. October 1, 1877, he made an arrangement with his brother, the defendant Fritz Hollender, whereby the latter was to pay Emil three cents for every 24 stoppers made under the patent, each time the 24 were used. The business consisted in selling beer and ale in the bottles which had the stoppers, the bottles and the stoppers not being sold, but being returned, and the bottles refilled and sent out again.

The evidence shows that Emil was not a partner with Fritz in the business. He had nothing at risk in it. His profits or losses did not depend on the risk of the business. Fritz paid him the three cents on every 24 bottles, without reference to whether the actual profit was more or less, or anything. The three cents was arrived at by figuring that the profit on every 24 bottles of ale or beer would be six cents net, and Emil was to have three cents for every 24 bottles sold. But this did not make him a partner. The use of the stoppers was not a use of them by Emil "for his own proper business." It was a sublicense by Emil, which was not authorized by the agreement. In *Rubber Co. v. Goodyear*, 9 Wall. 788, 799, a person was licensed to use Goodyear's invention for a certain purpose, "at his own es-

tablishment, but not to be disposed of to others for that purpose without the consent of" Goodyear.

The court says of this license, that it authorizes the person to use it himself, and gives him no right to authorize others to use it in conjunction with himself, or otherwise, without the consent of Goodyear, and that it was to be used at his own establishment, and not at one occupied by himself and others. In the absence of affirmative authority to Emil Hollender to dispose of the license to others, or to allow it to be availed of by others, it must be read as if it forbade a disposition of it to others.

Enabling Fritz Hollender to make part or the whole of a profit of three cents on 24 bottles, by using stoppers under the license, was dealing with the license in a way not authorized. In *Troy Iron & Nail Factory v. Corning*, 14 How. 193, 216, it is said that "a mere license to a party, without having 'his assigns,' or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensee, and is not transferable by him to another."

5. A patent granted by the United States, July 17, 1855, to Jules Jeannotat, for an "improvement in bottle-fastenings," is set up in the answer, and put in evidence, on the question of novelty; but no witness on either side gives any testimony in regard to it, in this suit. I have examined it, however, and, for the reasons assigned in the decision made herewith, in the suit of the same plaintiffs against Vom Hofe, am of opinion that it has no bearing in favor of the defendants in this suit.

6. It remains to consider but one more defence, and that is the alleged prior invention of one Otto. That Otto made, and made some use of, prior to the invention of De Quillfeldt, a structure, the identical original of which, and the bottle to which it was applied, less a round piece cut from a piece of India-rubber hose and tacked by a tack on the center of the diameter of the lower face of the wooden stopper, are now produced, is, I think, established by the evidence. That structure is "Defendants' Exhibit, Otto Bottle-stopper, Oc-

tober 21, 1879." It has an arrangement of neck band, lever, yoke, and rigid upper part of stopper, with three pivotal connections, which, if the whole stopper had been a perfect compound stopper, as the stopper of the plaintiffs' patent is, composed of substantially such an elastic part as said patent shows, with such rigid upper part, and if the whole combination of compound stopper, yoke, lever, and neck-band had been capable of operating in the way the combination set forth in the first claim of the plaintiffs' re-issue operates, to produce effectively the results produced by that combination, would have been an anticipation of that claim and of the second claim. The rule laid down by the supreme court in *Coffin v. Ogden*, 18 Wall. 120, 124, is as follows: "The invention or discovery relied upon as a defence must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation,—it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires not conjecture, but certainty. If the question relates to a machine, the conception must have been clothed in substantial forms which demonstrate at once its practical efficacy and utility. *Reid v. Cutter*, 1 Story, 590. The prior knowledge and use by a single person is sufficient. The number is immaterial. *Bedford v. Hunt*, 1 Mason, 302. Until his work is done the inventor has given nothing to the public."

Otto kept a beer saloon. He made only one such structure. He put it upon a bottle. He put beer into the bottle, and had the bottle and structure in his saloon. It was seen by many persons, who saw what it was and worked it, so far as it was capable of being worked. Glasses of beer were poured out of the bottle for customers, and it was refilled. Otto

says he used the structure and bottle in his saloon from two to three times a week, and about two years. Although he sold beer in bottles to be taken away from his saloon and opened elsewhere,—bottles with corks, as he says,—he never sent this bottle and structure away from his saloon. Before he made his structure he had, he says, seen bottles with a patent stopper, of one Schlesting, which had a compound stopper composed of a rigid top piece and an elastic member, and was opened and closed by means of a separate lever or piece of iron. But he says he did not procure the Schlesting stopper, and for the reason, as he says, that he used to send out beer in bottles, and would have to give to each customer a piece of iron to open the bottle, which was liable not to be returned, and he says that for this reason he tried to make a stopper that would suit him better. Yet the new structure could not have been a satisfactory one to be used for the purpose of replacing corks, or in lieu of adopting the Schlesting stopper, and to be sent out with bottles of beer, or Otto would have had more of them made, and would have put them to the use of transportation. The original specification of De Quillfeldt says that his stopper is to close bottles in a "secure" manner, as well as in a quick and convenient manner, and that, when closed, the "stopper is seated so firmly on the bottle that no accidental detachment in handling is possible." The re-issue says that the bottle mouth is "securely closed" and "tightly" closed. It is not shown that this structure of Otto's closed the bottle mouth securely or tightly. Unless this was done the structure was useless. The evidence on this subject is entirely wanting. Otto says that he used the structure in his saloon, and that it worked "good." He gives this account of the way in which he used the structure in his saloon: "I filled the bottle with Rochester beer. I used to pour out one glass from it to a customer and enclose it again and place it on the table. Either they would pour out the second glass themselves, or, if they couldn't open it, I would show it to them, and pour out a second glass, too. Then, when I bottled beer again, I filled it again and sold it as before." This structure he says he so used for two years

from the spring of 1874. For three years from 1876 it stood unused under his counter. Sometime in 1879—the piece of India-rubber on the stopper having before that time been lost from it, but when or where does not appear—the bottle and what remained of the structure, in the state in which they are now presented, were put into an old trunk out of doors, under stairs leading from the saloon to the yard, with other bottles for which he says he had no use, and which he placed in the same trunk at the same time. There it remained until September, 1879, when the defendant Fritz Hollender accidentally learned about it from Otto. Fortenbach says that Otto had Schlesting stoppers and opened them with a separate lever before he, Fortenbach, saw the Otto stopper at Otto's saloon in the spring of 1874; and that Otto then said to him, in reference to the latter, that it was handier than using the separate lever. It undoubtedly was, and the new stopper was one to instantly replace corks; and the Schlesting stopper, if a complete and perfect stopper, capable of closing the bottle securely and tightly, for handling and transportation. Otto was a locksmith, and had a locksmith's shop on his premises, and with the same tools with which he had made this structure he could have readily made others like it, if this were a successful bottle-stopper, in the sense above stated. All that Fortenbach says about it is that, according to his judgment, it worked well. Kern says it worked well, and was better than all the corks they had before, and that before they had it they had nothing but corks. Krause says that it seemed to operate "good." Giebner says that it operated "quite well," and that the rubber closed it "quite well." The above is all there is from the witnesses who saw the structure that gives any idea as to the effectiveness of the stopper. The evidence is wholly defective and insufficient. But, besides, the testimony as to a trial now of a structure made on the part of the plaintiffs as nearly as possible like the original structure, with a disk of rubber slightly thinner and rather more flexible than the rubber disk which Otto says he used, and the testimony as to the

appearances visible in and absent from Otto's structure, as bearing on the question of the strain to which it has been subjected, and the testimony as to Exhibits A and B, introduced by the defendants as duplicates made now of Otto's structure, and my own examination of that structure, in connection with all the evidence before alluded to, and with the whole testimony in the case, lead to the conclusion that Otto's structure was not an anticipation of the De Quillfeldt invention. If it had the use which Otto says it had, it never was subjected to the strain necessary to close the bottle securely and tightly, sufficient for handling and transportation, and it amounted only to an experiment, which was abandoned. The whole evidence shows that it must fall into the rank of abandoned experiments. To no one of those who saw it, nor to Otto himself, did it suggest the idea of being a stopper which was fit to use on bottles which were to be sent out with beer. It failed to do so, if used as long and as often as Otto says it was, because it was not in such a state as to close the bottle securely and tightly. It failed to do so, equally, if not used as long and as often as Otto says it was. The defendants have not shown that the invention was complete, and capable of producing the result sought to be accomplished,—the result accomplished by the De Quillfeldt device. The thing was inchoate, and rested in experiment. The process pursued for its development failed to reach the point of consummation. However nearly Otto approximated to the end in view, he only made progress. The world derived no benefit from what he did. The recollection of it was stimulated by the success of De Quillfeldt's invention. But for that Otto's structure would have still been reposing in the old trunk beneath the stairs, forgotten and worthless. The substantial form in which Otto clothed his conception, so far as it is preserved, and so far as its original arrangement and operation can be understood, does not demonstrate that it had the practical efficacy and utility which characterize the De Quillfeldt stopper. Otto's work was not complete, and he gave nothing to the public.

These views apply to all that there was in Otto's structure. It was a unit. It was an abandoned experiment as a whole. It cannot affect any one of the claims of the plaintiffs' patent.

There must be a decree for the plaintiffs for an account of profits, and an ascertainment of damages, and a perpetual injunction, in accordance with this decision, with costs.

PUTNAM and another v. VON HOFE.

(Circuit Court, S. D. New York. February 10, 1881.)

1. COMBINATION—TRANSPPOSITION OF PARTS—INFRINGEMENT—IMPROVEMENT IN BOTTLE-STOPPERS.

Re-issued letters patent granted to Karl Hutter, June 5, 1877, for an improvement in bottle-stoppers, claimed, *inter alia*: "(9) The combination of the pivoted bottle-stopper, C, neck-ring, A, and eccentric lever, B, the said yoke and eccentric lever being pivoted together and arranged so that the stopper is forced into the bottle by swinging the handle part of the lever against the side of the bottle, substantially as herein shown and described." *Held*, that such claim was infringed by a bottle-stopper, containing all the elements described, having the lever pivoted to the middle part of the yoke, instead of to the lower ends of the yoke, as in the patented structure.

2. SAME—FORMAL MODES OF CONSTRUCTION—SCOPE OF RE-ISSUE.

Held, further, in view of the prior state of the art, that the re-issue was not limited to the formal modes of construction therein described.

3. SAME—FOUNDATION INVENTION.

Held, further, that the patentee was the first person who had combined, by three pivotal connections, the four elements of the first claim of the re-issue in a combination having the mode of operation therein set forth.—[Ed.]

Arthur v. Briesen, for plaintiffs.

John Van Santvoord, for defendant.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent granted to Karl Hutter, June 5, 1877, for an improvement in bottle-stoppers, the original patent having been granted to Charles De Quillfeldt, as inventor, January 5, 1875. This is the same re-issue adjudicated upon in the v.6,no.9—57

suit, decided herewith, of the same plaintiffs against Fritz Hollender and William Hollender.*

1. The infringing stopper in this suit, known as Exhibit No. 1, is called the Von Hofe stopper, and is the same as Exhibit No. 11 in the Hollender suit. It is shown in this suit to be made in accordance with the description in letters patent granted to the defendant August 24, 1875, No. 167,141, for "an improvement in bottle-stoppers," the application for which was filed July 30, 1875. The application for the original De Quillfeldt patent was filed November 30, 1874. It is alleged in this case that the defendant's stopper infringes the first and ninth claims of the plaintiffs' re-issue. In the Hollender suit it was not alleged that the Von Hofe stopper infringed the ninth claim. It was alleged that it infringed the first and second claims. In this suit it is not alleged that it infringes the second claim. The question as to its infringement of the first claim was very fully considered in the decision in the Hollender suit, and the stopper was held to be an infringement of that claim. The defendant's stopper contains all the elements found in the ninth claim of the plaintiffs' re-issue, combined in substantially the same way and having substantially the same mode of operation. The ninth claim is for "*the combination of the pivoted bottle-stopper with the yoke, C, neck-ring, a, and eccentric lever, B, the said yoke and eccentric lever being pivoted together and arranged so that the stopper is forced into the bottle by swinging the handle part of the lever against the side of the bottle, substantially as herein shown and described.*"

The defendant's stopper has the combination of a pivoted bottle-stopper, composed of a rigid part and an elastic part, a yoke, a neck-ring, and an eccentric lever; the yoke and the eccentric lever being pivoted together and arranged so that the stopper is forced into the bottle by swinging the handle part of the lever against the side of the bottle. The lever in the two stoppers is eccentric, in the sense of that word as used in the plaintiffs' specification. That specification says that the pivoted connections of the yoke to the lever are so

*Ante, 882.

placed that when the lever has been turned against the bottle, to the position to hold the compound stopper so that it closes the bottle mouth, those pivotal connections are at that time turned past the vertical plane which passes through the pivotal connections of the lever with the neck-band, and the pivotal connection of the yoke with the compound stopper, so as to lock the compound stopper in its closed position. The specification of the defendant's patent describes a like eccentric action in saying that, when the lever is so far depressed as to come against the bottle, the yoke swings beyond the fulcrum pin in the lugs on which the lever turns, and the lever is securely retained in its locking position. The only difference between the two structures in this respect is that in the De Quillfeldt stopper the lever pushes the lower ends of the yoke beyond the center, and in the Von Hofe stopper the lever pulls the middle part of the yoke beyond the center. But this difference is only formal, and results from the fact that in the former the lever is pivoted to the lower ends of the yoke, and in the latter it is pivoted to the middle part of the yoke. There is, therefore, an infringement of the ninth claim.

2. The defendant has introduced several prior patents on the question of novelty, as well as to affect the construction of the claims of the plaintiffs' re-issue. There are the following United States patents: Jeannotat, July 17, 1855; Cronk, March 19, 1861; Wiegand, September 29, 1863; Schlich, September 5, 1865; Robinson and Jenkins, December 11, 1866; and Weber, July 2, 1867. There are the following English patents: Chalus, full specification filed March 7, 1857; Thompson, full specification filed September 28, 1867; Michaelis, full specification filed March 11, 1873; and Thompson, full specification filed August 14, 1874. In view of such bottle-stoppers as are described in the foregoing patents, the defendant, by expert testimony, seeks to divide bottle-stoppers which have yokes and levers into classes,—one class having the lever between the bottle neck and the yoke, and thus drawing the yoke down, to which class the De Quillfeldt is assigned; another class having the lever between the stopper and the

yoke, and thus drawing the yoke up, to which class the Von Hofe stopper is assigned. These prior patents are adduced as showing a lever between a yoke and a stopper, and a lever between the bottle neck and a yoke, and as showing in each form the eccentric action before referred to, and as showing a combination of stopper, lever, yoke, and neck wire still connected together and to the bottle after the bottle is unstoppered, and capable always of moving relatively to each other without disconnection, and as showing a compound stopper composed of a rigid disk and an elastic disk. On what is found in these prior patents the defendant contends that the plaintiffs' are limited to a lever frame, the fulcrum of which is pivoted to the neck wire of the bottle, a yoke which is pivoted to the lever frame at points between such fulcrum and the handle of the lever, and a compound stopper which is pivoted to the yoke. The defendant also contends that there are three pivotal connections in Jeannotat,—the yoke to the neck of the bottle, the lever to the yoke, and the lever to the stopper; and that there are three pivotal connections between certain parts in Chalus, Michaelis, Cronk, and Robinson and Jenkins. In regard to Wiegand, Schlich, Weber, Thompson of 1867, Michaelis and Thompson of 1874, the defendant's expert testifies that he does not consider any one of them an anticipation of the invention described in the De Quillfeldt patent, and more particularly of that claimed in the first claim of the re-issue. He does not express a contrary opinion in regard to Jeannotat, Cronk, Robinson and Jenkins, or Chalus. In regard to Jeannotat, Cronk, Robinson and Jenkins, and Chalus, the plaintiffs' expert testifies that he does not find in any of them any of the devices secured by the plaintiffs' re-issue. In regard to Jeannotat the plaintiffs' expert testifies that there are in it but two pivotal connections,—the yoke to the neck band and the lever to the cap-piece of the yoke,—and no pivot between the stopper and the device for applying pressure, and no eccentric action, and no such compound stopper as De Quillfeldt has, and no action of the lever to draw the stopper out of the bottle. The defendant's expert states that in Jeannotat a part of the yoke is connected with

the stopper by pins which act as pivots; but the plaintiffs' expert does not concur in this view, and he is clearly right, because while the stopper is being forced to its place in Jeannotat there is no pivotal action between the stopper and the yoke, as there is in the De Quillfeldt stopper, but only a sliding motion. Nor is there in Jeannotat any pivotal connection between the lever and the stopper, as there is in the defendant's stopper. In regard to Cronk, the plaintiffs' expert testifies that it has no lever; that it has not such three pivotal connections as are referred to in the De Quillfeldt patent; that there is nothing in it to produce a locking action; and that the stopper is not pivoted to the yoke. In regard to Robinson and Jenkins, he testifies that the stopper is not pivoted to the yoke. In regard to Chalus, he testifies that there are but two pivots. The Jeannotat, Cronk, Robinson and Jenkins, and Chalus patents were under consideration, on final hearing, by Judge McKennan, in a suit before him on the plaintiffs' re-issue, against Hammer and Sunderman, and were held to be no answer to the suit. The stopper which was held in that case to be an infringement of the first claim of the plaintiffs' re-issue, appears to be like the defendant's stopper in the particulars before set forth, in which that stopper is held to infringe the said first claim.

The defendant's expert is of opinion that the defendant's stopper does not contain the De Quillfeldt invention because it has projections, and the ends of the lever are not pivoted to the bottle neck, and the yoke is pivoted to the neck wire, and the yoke is not pivoted to the stopper, and the lever is not pivoted to the lower ends of the yoke. These views would have force if the plaintiffs' re-issue were required by the prior state of the art to be limited to the formal modes of construction described. But De Quillfeldt is shown to have been the first person to combine, by three pivotal connections, the four elements of the first claim of the plaintiffs' re-issue in a combination having the mode of operation set forth in said claim. The success of his stopper was due to such combination. All prior stoppers failed of the result for want of such combination. The defendant did not make his stopper

in the infringing form until after he had seen the construction and operation of the De Quillfeldt stopper. That disclosed the necessity of three pivotal connections between the four elements of the stopper. This was the foundation idea, and makes De Quillfeldt's the foundation invention. However nearly prior inventions approached, they did not reach success.

3. The defendant put in evidence two other English patents,—one to Henry, final specification filed October 29, 1862, and one to Mennons, final specification filed October 1, 1868. No witness for the defendant gives any testimony as to anything in either of these two patents, and therefore they cannot receive much attention. It is apparent, from the testimony of the plaintiffs' expert, that they do not affect the plaintiffs' re-issue.

4. It is contended that the defendant anticipated De Quillfeldt by making, in 1869, a stopper like Exhibit P, which he then exhibited to many persons. Only one was then made. It disappeared, and nothing more was done about it till the latter part of 1874, when one was made, modified into a structure like P^a, and Fritz Hollender, the defendant in the Hollender suit, made some stoppers like P^a. In the form of P^a, Von Hofe applied for a patent for it, January 20, 1875, and a patent for it was issued to him, No. 163,553, May 18, 1875. The stopper did not operate well, and then the stopper, Exhibit No. 1, was got up by Von Hofe, after he had seen the De Quillfeldt stopper. The reason why the stopper P, in the form it had, and in all the modified forms of it made by Von Hofe, and in the form shown in patent No. 163,553, did not succeed as a stopper, was because of the difficulties in it which were remedied in Exhibit No. 1, and which remedies were first applied by De Quillfeldt in his stopper. All of the Von Hofe stoppers, until Exhibit No. 1, had a slot in the plate of the cam instead of a pivotal connection by a pin in a hole which is not a slot, so that there was a play to the lever besides the turning motion on an axis. In consequence of that, in closing the stopper in Exhibit P^a, it would sometimes fly out, as Fritz Hollender says. He says that in Ex-

hibit No 1 that is not the case. The same difficulty existed, for the same reason, in Exhibit P, and in all the forms of the Von Hofe stopper before Exhibit No. 1. The slot is called "an eccentric slot," in patent No. 163,553. Its existence made the action of the structure uncertain, and the structure must fall within the category of an incomplete experiment towards the invention of De Quillfeldt.

5. The only other defence insisted on in this case is the alleged prior invention of Otto. That has been considered fully in the decision in the Hollender case.

There must be a decree for the plaintiffs on the first and ninth claims of their re-issue, and for a reference in the usual form as to profits and damages, and a perpetual injunction, with costs.

SMITH and another v. MERRIAM and another.

(Circuit Court, D. Massachusetts. January 22, 1881.)

1. STAY-STRIP—ANTICIPATION.

A stay made of a folded strip of leather for covering and strengthening seams of boots or shoes, and provided with marginal grooves for reception of the stitches, and beaded edges for protection of the same, is not patentable as an article of manufacture, in view of the prior existence and use of harness trimming, ladies' belts, and straps for pocket-books made of folded strips of leather, and provided with marginal grooves and beaded edges which served the similar purpose of receiving and protecting stitches.

2. SAME—RE-ISSUE.

Where the original patent described and showed that, by applying a stay-strip to the seam of a boot or shoe, there would be formed upon its under side a central longitudinal channel or recession, by virtue of its being saddled over the seam, a valid re-issue cannot be taken for a stay-strip having such a central recession formed in it beforehand to fit or hug the seam.

In Equity.

Geo. L. Roberts & Bros., for complainants.

E. P. Brown, for defendants.

LOWELL, C. J. I have to-day decided, in a case between the parties to this suit,* that the plaintiffs' patent for a presser-foot adapted to sewing stay-strips over the outward turned seams of boots and shoes is valid. The present controversy relates to another patent granted to the plaintiff Sutherland, re-issue No. 7,510, for a stay-strip as a new article of manufacture. The stay-strip, as described, is a narrow piece of leather folded or doubled so as to fit over the projecting seam, and with a channel or groove to hug or fit that seam, and other grooves at the sides of the seam calculated to receive the stitches by which the stay is fastened to the boot or shoe. The projection of the seam raises a fillet, as it is called, or swell, which serves to protect the stitches, and this is done still further by the beads or swells or fillets which bound the grooves on the edges of the stay-strip. The specification explains one great advantage of a strip thus prepared to be that it can be sewed automatically to the boot or shoe without troubling the operator to guide it by hand so much as he must a strip of a different shape. He claims this stay-strip in its several forms.

The defendants make a stay-strip with beaded edges suited to receive the stitches. I cannot find in the article which they make any decided central groove or corrugation adapted to the seam. They do not, therefore, infringe the first claim or the third, but do come within the second, which is for the stay-piece with these side grooves. The decision, then, must depend upon the validity of the re-issued patent.

The original, No. 176,094, was for an improvement in stay-seaming boot or shoe uppers, and described the method of putting a stay, with channels for the stitches, over an outward turned seam, as contrasted with the old method of turning the seam inward and leaving it unprotected. I am unable to find in it any mention of automatic sewing, or of a central channel to hug or fit the seam. On the contrary, the method described is simply to put a folded or double strip over the seam and sew it there. This will form a channel in the finished work, as the model from the patent-office, when cut

**Ante*, 713.

open, clearly shows; and one sort of channel formed by the separation of the edges of the folded strip is shown in the drawings; but neither of these comes up to the description of the re-issued patent. The former does not enable the strip to hug the seam during the process of sewing, for it is made by that process; the latter appears to be an accident, and forms no part of the re-issue as construed by either party.

The objections taken to the re-issue come to this: that it describes as a new article, to be made for the boot and shoe manufacturers, what the first patent did not fully describe, and which by that patent might be entirely made, as to all its distinctive features, in the very process of sewing, and, therefore, as an article of manufacture was incomplete, for no one could practically make a stay-strip for sale by ripping out the stitches.

The admitted or uncontradicted state of the art I understand to be this: Strips had been sewed over the seams of boots and shoes by hand, and by sewing machines. In one class of work, soft strips had been applied to outward turned seams with a rolling presser-foot, and the effect of the operation was to leave slight grooves or depressions near the edges of the finished and applied strip, which had the useful property of protecting the stitches, and a central swell over the seam. Grooved or beaded edges of leather strips, where stitches were laid, had been used in harnesses and in ladies' belts, and straps for pocket books, and other articles. One of the pieces of harness produced in evidence looks very much like the plaintiffs' stay-strip. In this state of the art, and of the plaintiffs' patents, I am of opinion that a stay-strip with beaded edges, to protect the stitches, could not be patented as a new article of manufacture, and that a stay-strip with a central recession formed beforehand, to fit or hug the seam, could not be patented by the re-issue.

Bill dismissed.

THE SAMUEL H. CRAWFORD.

THE NIAGARA.

(District Court, E. D. New York. March 3, 1881.)

1. COLLISION AT SEA — LOOKOUT — LIGHTS — TORCH-LIGHT — REV. ST.
§ 4234—SALVAGE.

Where a collision occurred at sea between a schooner bound to New York and a steamer bound to the Delaware, each libelled the other for damages, and the steamer also libelled for salvage, having taken the schooner in tow; and upon trial—

Held, that the corner of the house on deck, where the schooner carried her red and green lights, was not a proper location for the side lights; but where it appeared that, in spite of this location, the lights were visible to the approaching vessel, the faulty location of the lights did not conduce to the collision, and does not render the vessel liable.

Section 4234 of the Revised Statutes requires a lighted torch to be exhibited by a sailing vessel to an approaching steamer, whether the steamer be approaching from forward or abaft the beam; and where such torch is not exhibited the sailing vessel will be held in fault, unless clear proof be given that the failure did not contribute to the collision.

Where lights of a schooner, plainly exhibited to a steamer, were not actually seen by the steamer until the schooner was too close upon her to avoid a collision, *held*, that the steamer was in fault; and, both vessels being in fault in this case, the damages must be apportioned.

2. SALVAGE SERVICES.

Services rendered by a steamer to a sailing vessel run down by fault of the steamer do not entitle the steamer to claim salvage.

Goodrich, Deady & Platt, for the Niagara,

Beebe, Wilcox & Hobbs, for the S. H. Crawford.

BENEDICT, D. J. The three causes above mentioned have been tried together. The first-named is brought by the owners of the steamship Niagara to recover of the schooner Samuel H. Crawford the amount of damages caused by a collision that occurred between those two vessels off the capes of Delaware on the thirtieth day of December, 1880. The second action is brought by the same libellants to recover salvage for services rendered by the steamer Niagara to the schooner Samuel H. Crawford, immediately after the collision referred to, in towing her, when disabled by the collision, from the place of

collision to New York. The third action is brought by the owners of the schooner to recover of the steamer the damages caused to the schooner by the same collision. The mass of evidence that has been presented by the respective parties to this controversy establishes some things beyond the possibility of dispute, among them these: The time of the collision was about half-past 3 o'clock A. M. The weather at the time was clear and very cold, the thermometer being some 14 degrees below zero. It was dark, but, according to the libel of the steamer, her lights could have been seen by the approaching vessel for more than 20 minutes before the collision. The wind was from the north-west, and blowing fresh. The steamer was bound down the coast on a course south by west, three-quarters west, with her signal lights all burning brightly, and at her usual speed. The schooner was bound up the coast, sailing close-hauled, on a course north by east, or north-north-east, and nearly head on to the steamer. No one on board the steamer observed the schooner until the two vessels were so close together as to render collision inevitable. As soon as the presence of the schooner was known on board the steamer, the steamer's helm was put hard a-starboard, and signals given to the engineer in quick succession to slow, stop, and back. The vessels came in contact just as the engineer received the first signal. The jib-boom of the schooner came over the starboard bow of the steamer, the end of it hitting the steamer's foremast. The bowsprit of the schooner was broken off and turned back upon the schooner. The schooner's foremast was carried away, and the fluke of her anchor that lay upon her starboard bow was broken. The head-sails, bowsprit, and foremast of the schooner were thrown back upon her starboard bow. A stanchion from the steamer was thrown upon the schooner's deck near the main rigging, some 60 feet aft the bow, and upon the starboard side of the deck.

The port side of the schooner showed no marks of the collision. No part of the schooner was left upon the steamer, but the steamer sustained a severe injury upon her starboard bow, some distance from the stem, and showed marks

of contact with the schooner as far aft as the stern davit. These facts make a case of fault on the part of the steamer, provided the schooner was displaying lights capable of being seen by the steamer at a sufficient distance to enable her to avoid the schooner. The case, so far as the steamer is concerned, must, therefore, turn upon the question of lights upon the schooner. Upon this question there is a conflict of evidence, but a careful study of the testimony has satisfied me that the weight of the evidence is that the schooner, as she approached the steamer, was displaying a light capable of being seen by those in charge of the steamer in time to enable her to avoid the schooner. The evidence from the steamer on this point is the testimony of two seamen, who were stationed upon the steamer's bow as lookouts, and who agree in declaring that they were keeping a watchful lookout, saw the schooner first when close at hand, and saw no light upon her. In addition there is from the steamer the testimony of several persons who observed the schooner from the instant of collision, and observed no light upon her until after the vessels had passed each other, when she displayed a white light.

The weight of the testimony of those on board the steamer, who speak as to what they observed at the moment of collision, and immediately thereafter, is diminished by the fact that these observations were made in the confusion and excitement necessarily incident to such a serious collision, and by the further fact that it is difficult to reconcile the statement of several of the witnesses from the steamer that the port side of the schooner was presented to the steamer, as she swept past the steamer's starboard side, with the nature of the blow, the absence at that time of head-sails on the schooner, the injury to the starboard side of the schooner, and the movements of the schooner after the blow, as testified to by those on board of her.

In opposition to this testimony from the steamer, there is from the schooner the direct and positive testimony of six persons that both the red and green lights of the schooner were set and burning brightly at the time of the collision.

In addition, it is proved by these witnesses that from the time the steamer was reported by the lookout of the schooner, and for some time prior to the collision, the mate of the schooner was standing upon the schooner's forward house. The screens for the side lights of the schooner were placed on the forward corners of this house. The mate of the schooner, therefore, while these vessels were approaching each other, was standing between the two side lights, and where it was not possible for the absence of either of those lights to have escaped his attention. It cannot be believed that a mate so standing would have permitted either of the side lights to remain even dim, not to say extinguished, approaching, as he was, a steamer, seen to be coming nearly head on to him, on a dark night, with the thermometer 14 degrees below zero. It seems certain that, if there had been any deficiency in the side lights of the schooner, self preservation would have forced the mate, standing, as he was, to observe and remedy it at once. There is, besides, another circumstance, not of a character likely to be fabricated, which, if true, is conclusive to show that at least one of the schooner's side lights was burning brightly. It is proved by three witnesses that, after the collision and before the steamer had come to the assistance of the schooner, while those on the schooner were waving a bright light to call the attention of the steamer, and after a gun had been fired, one of the men suggested to the master of the schooner that a red light was the signal of distress, and it would be well to wave the red light; whereupon the red light was taken from the screen and waved towards the steamer to attract her attention to the schooner's distress. These circumstances, coupled with the superiority in the number of those who give direct evidence as to the lights displayed by the schooner as the vessels approached each other, make a clear preponderance in the weight of testimony in favor of the schooner's assertion that she had proper lights displayed.

An effort has been made to maintain that the side lights of the schooner, placed as they were on the corners of the forward house, were in a situation to be obstructed by the

head-sails of the schooner, and therefore were not visible to the steamer. But the measurements of the schooner show that the light on either side was less than four feet inside of the point of the shrouds opposite to the corner of the house on that side, and that none of the head-sails could be an obstruction of the light to a vessel ahead.

In regard to the red light being at the time the windward light, it is not possible to contend that that light, if burning properly, would not be visible to the steamer approaching, as this steamer was, nearly bow to bow.

I therefore conclude that the schooner, as she approached the steamer, was displaying lights which a watchful lookout on the steamer would have seen in time to avoid her, and that the cause of the failure on the part of the steamer to see the schooner until it was too late to avoid her, was the absence of such a lookout.

But it is contended in behalf of the steamer that, if it be found that the schooner had her side lights set and burning, the schooner must nevertheless be held responsible for the collision, because of the admitted fact that her side lights were placed inboard, on the corners of the forward house, instead of in the rigging. The difficulty with this contention is that the fact that the red light was a short distance further inboard than it would have been if placed in the rigging, becomes immaterial in this case when it appears that, located as the light was, it showed a clear light ahead without obstruction. I do not approve of the location of the schooner's lights, but I cannot find that the location in any way conduced to this collision, because it appears that there was nothing to obstruct those lights in the direction of the steamer. It is also, and with better reason, contended in behalf of the steamer that the schooner must be held in fault for omitting to comply with the statute, which declares that "every sail-vessel shall, on the approach of any steam-vessel during the night-time, show a lighted torch upon the point or quarter to which such steam-vessel shall be approaching." Rev. St. § 4234.

In regard to the statute, the ground has been taken in

behalf of the schooner that the intention of the provision was not to require a torch to be shown as an addition to the colored lights, but only to provide for the display of a light to a steamer when approaching from abaft the beam when the colored lights do not show, and that any other construction would impose an onerous obligation upon sailing vessels under circumstances when its performance would be useless. I should, for myself, feel inclined to limit the provision in question to cases of a steam-vessel approaching abaft the beam, if I could discover in the language of the provision any ground for such a limitation; but the words are general, and cover all cases of an approaching steamer, no matter from what direction she may come. Nor can I say that the provision, unless so limited, imposes a useless obligation upon a sailing vessel. It may be that under some circumstances the light of a torch would catch the eye when a colored light had escaped observation. And I am without information that experience has shown that the exhibition of a torch in addition to the colored lights would be a useless precaution. At any rate, the exhibition of a torch gives certain notice to the steamer that those on the sailing vessel have observed her approach. I am unable, therefore, to limit the operation of the statute to cases of an approach from abaft the beam. Upon the conceded facts, then, the schooner must be found guilty of fault, and responsible for the collision in question, because of her failure to show a torch to the approaching steamer; for it cannot be found as a fact in this case that a torch so shown would not have been seen by those on board the steamer.

If the proof had been that there was no one on the steamer located so as to be able to see a torch displayed from ahead, a different case would have been presented. Here, even if it be, as supposed by the schooner, that the lookouts on the steamer were absent from their posts for a part of the time while the schooner was visible, still there remained one man at the wheel and another in the wheel-house who might have noticed the torch if it had been displayed. Where a failure to see an approaching vessel is the immediate cause of a col-

lision, and the evidence shows a failure on the part of the approaching vessel to discharge a statutory obligation, the sole purpose of which is to enable an approaching vessel to be seen, clear proof would seem to be required to justify the conclusion that the collision was in no way attributable to the failure to discharge the statutory obligation.

Upon these grounds, therefore, I find that the collision in question was caused by fault on the part of both vessels, and accordingly the damages must be apportioned. The libel for salvage must, under such circumstances, necessarily be dismissed.

NOTE. In *Farrell v. The Steam-boat John H. Starin*, 2 FED. REP. 100, (S. D. N. Y.,) and *Schooner Margaret v. Steamer C. Whiting*, 3 FED. REP. 870, (E. D. Pa.,) it was held that a failure to comply with the statute did not render the vessel liable, unless the omission tended to produce the collision. In the first case it was deemed essential that the steamer should be approaching some particular "point" on the sailing vessel in order to render the statute applicable. In *Kennedy v. The Steamer Sarmatian*, 2 FED. REP. 911, (D. Md.,) it was held that the statute was sufficiently broad to require a light to be exhibited to a steamer coming up astern; while in *Brainard v. The Steamer Narragansett*, 3 FED. REP. 251, (D. Conn.,) it was further held that the requirement of the statute was not confined merely to those cases where a steamer was thus approaching a sailing vessel from astern.

In the case of *Kennedy v. The Steamer Sarmatian*, *supra*, Chief Justice Waite held that the rule contemplated the keeping of a sufficient watch over the stern to enable the vessel to perform her duty as to the lights; and that it was negligence in a schooner, under the general rules of the sea, not to show a torch-light, or do something else calculated to give notice of her dangerous proximity to an approaching steam-vessel.—[Ed.

THE CHARLES MORGAN.

(District Court, D. Kentucky. May 3. 1881.)

1. COLLISION—PASSING BOAT.

An approaching and passing boat takes upon herself the peril of determining what is a safe distance in passing another boat going in the same direction, and must bear the consequences of a misjudgment in that respect.

2. SAME—SAME.

In determining the question of distance, however, the passing boat has a right to assume that the other boat is well equipped, and is being managed and run with ordinary care and skill.

SAME—SAME.

After the boat which is being passed has replied to the passing boat's signal in the affirmative, she is bound to continue in her then course, if it can be done without immediate danger to herself or other boats that may be in or along the river.—[Ed.]

In Admiralty.

J. K. Goodloe, L. H. Noble, and Bentinck Egan, for libellant.

Hamilton Pope, James Speed, and W. A. Bullitt, for claimant.

BARR, D. J. The steamer Charles Morgan, running between New Orleans, Louisiana, and Cincinnati, Ohio, left her landing at the former place a few minutes after 5 o'clock A. M. April 24, 1880. The steamer John W. Cannon, then running between New Orleans and Bayou Sara, Louisiana, left her landing a few hundred yards below, shortly after the Morgan, and both boats proceeded up the river. The Cannon, being the fastest boat, soon overtook the Morgan, and in passing in front of a place called the Bull's Head, in the city of New Orleans, the boats collided. The Cannon was disabled by this collision, and her owner, John W. Cannon, has filed this libel against the Morgan, alleging that she ran into the Cannon, and that this occurred by reason of a want of care and skill on the part of the officers and crew of the Morgan, and without the fault of the officers and crew of the Cannon.

The claimant, Thompson, owner of the Morgan, denies in his answer that the Morgan ran into the Cannon, and denies all negligence and want of skill upon the part of the officers

and crew of his boat, and states affirmatively that the collision was caused by the negligence, want of skill, and the improper conduct of the officers and crew having charge of the Cannon. Many depositions have been taken by each party, and, as is usual in such cases, there is much conflict in the statements of the witnesses. The Cannon was the fastest and passing boat; it was, therefore, her duty to pass the Morgan at a safe distance. In considering whether or not it was a safe distance to pass, the officers of the Cannon had a right to assume that the Morgan was well equipped, and was being managed and run with ordinary care and skill. This being assumed, the rule is that the approaching and passing boat takes upon herself the peril of determining what is a safe distance in passing another boat going in the same direction, and must bear the consequences of a misjudgment in that respect.

Judge Betts, in considering the duty of an approaching vessel in the case of the *Steamer Rhode Island*, Olcott, 515, says: "The approaching vessel, when she has command of her movement, takes upon herself the peril of determining whether a safe passage remains for her beside the one preceding her, and must bear the consequences of misjudgment in that respect." See, also, *Oceanus*, 12 Blatchf. 430; *Whitridge v. Dill*, 23 Howard, 454.

There is another rule which is material in this connection, and that is: after the boat which is being passed has replied to the passing boat's signal in the affirmative, she is bound to continue in her then course, if it can be done without immediate danger to herself or other boats that may be in or along the river. See Rules 22, 23, 24, and section 4233, Rev. St., and Pilot Rules for Western Rivers, No. 8; *The Grace Girdler*, 7 Wall. 202.

In this case there was a collision, and I should therefore assume the officers of the Cannon had misjudged the proper distance in passing the Morgan, unless they show by the evidence a want of reasonable care or skill upon the part of those in charge of the Morgan. The burden of proving this is upon the libellant. If, however, he proves that the Morgan, after

she answered the Cannon's signal affirmatively, changed her course without immediate necessity, and the collision thereby occurred, he has sustained this burden and his cause, unless the claimant proves this change was the result of causes which reasonable care and skill could not have avoided.

It may be assumed as undisputed in this record that the river at the place of collision was very deep from bank to bank. It was from 1,700 to 1,800 yards in width, and the Orleans shore was lined with shipping. The boats were running at their usual speed—the Cannon at the rate of 12 or 15 miles an hour, and the Morgan at the rate of 10 or 12 miles an hour. The Cannon was 285 feet in length and the Morgan 315. The Cannon had the most power and the Morgan the largest tonnage. The Cannon came up on the larboard side of the Morgan and blew two whistles, which were promptly answered by the Morgan. The Cannon then attempted to pass, and, doing so, the boats collided. The Cannon was injured by having the forepart of her wheel-house broken in, the gallows-frame of her starboard wheel knocked down, and this caused that wheel to drop into the river after she had run a few hundred feet. The Morgan was injured slightly, only about two feet of the house on her larboard side being knocked off. This was some 53 feet back of the flag-staff, and immediately behind the curve which makes the bow of the boat.

The testimony is much too voluminous for me to attempt to review it. I shall content myself with indicating my conclusions upon disputed facts, and briefly the reasons to those conclusions. I think the decided weight of the testimony is that the Morgan changed her course after she replied to the Cannon's signal, and that she ran into the Cannon, and not the Cannon into her.

This conclusion is sustained by all of the officers and passengers of the Cannon who have testified, and by others who were not on the Cannon. I think it is sustained by both of the pilots who were on the Morgan. Mr. Jamison, who was at the wheel of the Morgan, states distinctly he changed the course of the Morgan, and says this was done because of

a high wind blowing towards the Orleans shore. In another place he says this was necessary to avoid a tug and barges which were in front of the Morgan. It is true that he says in his redirect examination that this change was before the signal, but this is unsustained by any other testimony, and there was not the slightest reason for such a change at that time. Mr. Phillips, the other pilot, who was in the wheel-house of the Morgan, says "the Morgan started to go from the shipping—to run from it," when the Cannon was about abreast of the Morgan's pilot-house. The other evidence distinctly shows there was not a high wind blowing to the shore, nor were the tug and barge in the way of the Morgan. This tug was the Mahomet. With a barge in tow she was going up the river, and the decided weight of the testimony is that she was two and a half or three squares above the Morgan, and inside of her course. There was much conflict in the testimony as to the distance the Morgan was running from the shipping at the time the Cannon came up. Captain Albert Stine thinks his boat, the Morgan, was running from the shipping a distance of 125 feet. Other of claimant's witnesses put the distance less, and some of the libellants more. I should think, from all of the evidence, the distance was from 100 to 120 feet. It seems, however, to be the universal testimony that she was sufficiently far from the shipping to be safe if she were not crowded in. Whether she would have been safe had she been crowded in is not material to the present inquiry, because I do not find from the testimony that she was crowded in. The material inquiry is, did the safety of the shipping require that she should turn out from the shore? and I think the evidence proves that it did not. It is quite probable to those on the Morgan, who did not have the opportunity of observing accurately the courses of the boats, it looked as if the Cannon was running across the bow of the Morgan. This would be the appearance from the Morgan, though in fact she might be running towards and into the Cannon; nor is the character of the blows which these boats received inconsistent with the conclusion that the Morgan ran into the Cannon.

It is most probable that the Morgan did not strike the Cannon at the angle which most of the libellant's witnesses say she did. It is probable that the Morgan sheered towards the Cannon at a sharper angle than that at which she struck her. The testimony shows that the Morgan's guards were three feet higher than the Cannon's. It is probable that the Morgan's pilots, both of whom were then at the wheel and using all of their strength, had succeeded in changing her course somewhat, though the change was not sufficient to prevent the higher guards of the Morgan going in and giving the Cannon a sidelining blow.

The learned counsel for the claimant, however, insists that even if it be true the Morgan sheered and ran into the Cannon, it was caused by the current or suction produced by the running of the boats in such proximity, and that the Cannon took the risk of this when she selected her distance to pass, and for that reason cannot complain.

There is some evidence tending to sustain this theory, and it has been presented with much ability and ingenuity by the counsel, but my mind does not assent to it.

There is much contrariety of testimony as to how far the Cannon was outside of the Morgan as she came up to pass her. The libellant has taken the testimony of some 17 witnesses upon this point, and the average of these witnesses is 154 feet. The claimant's witnesses put the distance from 25 feet to 200 feet. The average of all the witnesses in the case is about 128 feet.

It is probable that the Cannon was running from 300 to 350 feet from the shipping along the shore, and about 150 feet outside of the course of the Morgan. It is quite clearly proven by many other pilots, whose depositions are taken as experts, that large steamers can and do safely pass within, say from 15 to 100 feet. There is evidence that boats running very close sometimes become locked, but this would indicate that the tendency was to go together broadside, and not across or into each other.

These boats were, say, 150 feet apart. The Morgan is the larger boat, though the Cannon is the faster and the more

powerful. The suction caused by the wheels of each boat would not materially differ. I do not see why they would not about neutralize each other; and, if this were not so, why the suction would not be greatest about and immediately behind the wheels of the respective boats. If this be true, this suction would have a tendency to bring the wheels and sterns of the boats together, and thus throw the bows out, and the power in the boats, if applied, would cause the bows to go from each other. If any collision was caused it would be by the back part of the boats swinging together.

Whatever may be the truth upon this subject, the theory advanced is too shadowy to base a judgment upon. I think the *Morgan*, after she signaled the *Cannon*, changed her course without any necessity for so doing. In doing this she violated a well-known and long-established rule of navigation, and is therefore liable for the damage done the *Cannon*. The case should go to a commission sworn to ascertain and report this damage.

THE MARY SHAW.

(*District Court, D. Maryland. April 16, 1881.*)

1. COLLISION—TUG AND TOW.

A tug, with vessel in tow, having given two blasts of her whistle without hearing any reply, steered in a narrow channel to pass an approaching steamer starboard to starboard instead of port to port, and did not repeat her signal until too late to avoid a collision, which took place between the steamer and the tow on the extreme edge of the channel. *Held*, that the tug was solely to blame.

2. SAME—NAVIGATION—LOCAL CUSTOM.

Held, that there is no local custom in the channels in the Patapsco river, and in the Chesapeake bay, at its mouth, for large vessels descending the channels to take the easterly side, and that the establishment of such a custom, not being called for by any necessity, is to be deprecated as a dangerous departure from the settled rules of navigation.

In Admiralty. Cross-litels.

John H. Thomas and A. Sterling, Jr., for libellants.

Charles Marshall and Sebastian Brown, for respondents.

MORRIS, D. J. These are cross-libels growing out of a collision between the British steam-ship *Gulnare*, 250 tons, and the schooner *Charles Morford*, 360 tons, in the Chesapeake bay, near the mouth of the Patapsco river, on March 5, 1881. The *Gulnare* left Baltimore, bound for the West Indies, on the afternoon of March 5, 1881, and at 7:30 p. m. was about two-thirds the way down the Craighill channel, when she met the steam-tug *Mary Shaw* coming up the channel with the schooner *Charles Morford* in tow.

The case stated by the libel filed by the owners of the *Gulnare* is that those in charge of her first saw the lights of the tug and tow at the distance of about two miles, and continued to see both their side lights until they had approached to within about three-fourths of a mile, when they heard one whistle from the tug, indicating that she proposed that the vessels should pass each other on the port side; that the *Gulnare* at once responded with one whistle, and ported sufficiently to shut out the green lights of the tug and schooner, and proceeded, keeping their red lights half a point or more over the steamer's port bow; that when the tug got within about three lengths of the steamer she blew two whistles and suddenly starboarded her helm, shut out her red light, showed her green light, and crossed the steamer's bow; that the steamer immediately stopped, reversed her engines, and succeeded in clearing the tug, and, while going astern, endeavored, by starboarding her helm, to turn her head to starboard so as to avoid the schooner, but that the schooner ported her helm when nearly abreast of the steamer, and, being under the press of all her lower sails, struck the steamer near her port cat-head, and so injured her that it was found necessary to have her towed back to Baltimore for repairs.

The case stated by the answer of the owners of the tug is that she was coming up the Craighill channel, having the schooner in tow attached to her by a sixty-fathom hawser, and was near the western side of the channel, proceeding at

about five miles an hour, when she first saw the lights of the steamer. They aver that it is customary for lighter craft approaching the port of Baltimore to give the eastern side of the channel to larger vessels, and especially to large steamers, as they can be more safely navigated on that side; that when the lights of the steamer were first seen, all her lights were visible, and that when she was between a mile and three-quarters of a mile off the tug gave two distinct and clear blasts of her whistle, indicating that the steamer should pass on the tug's starboard side; that *no response* was given by the steamer, but she continued to approach, showing both her side lights, when the tug again gave two blasts of her whistle, to which the steamer responded with two very faint whistles, but *continued to show her port light*, as if going across the course of the tug, when, perceiving that the steamer had not heeded her signals, the tug starboarded her helm, and the steamer passed her about the steamer's breadth off on the tug's starboard side, and came into collision with the schooner, the collision taking place outside of the western edge of the channel.

The Brewerton and Craighill channels form a continuous water-way from the Chesapeake bay to the port of Baltimore, the first being in the Patapsco river proper, and the latter in the Chesapeake bay at the mouth of the river, and nearly at a right angle with the first. They are from 250 to 400 feet wide, and were made by dredging out the natural channel. The navigation of these channels requires careful seamanship and an exact observance of every rule intended to prevent collisions. *Appleby v. Kate Irving*, 2 FED. REP. 924.

The rule governing steamers, and the signals they shall give when about to pass each other in these channels, is expressed in the eighteenth rule of the act of congress: "If two vessels under steam are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other;" and also by the pilot rules for lake and seaboard navigation:

"Rule 1. When steamers are approaching each other 'head and head,' or nearly so, it shall be the duty of each steamer

to pass to the right or on the port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give as a signal of his intention one short and distinct blast of his steam-whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam-whistle, and thereupon such steamers shall pass to the right or on the port side of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by the pilots as meeting head and head, 'or nearly so,' or if the vessels are approaching each other in such a manner that passing to the right (as above directed) is deemed unsafe by the pilot of either vessel, the pilot so first deciding shall immediately give two short and distinct blasts of his steam-whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam-whistle, and they shall pass to the left or on the starboard side of each other."

"Rule 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way, until proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The answer of the tug and the testimony of her officers attempts to set up a custom by which it is claimed the statutory rule is superseded. By this alleged custom they assert the rule to be that large steamers and heavy ships always take the easterly side of the channel, that being the side marked by buoys, and therefore the safest for them to keep to. There is no current or tide to contend with, and the only reason for such a custom would be that the depth is somewhat more uniform on the easterly side, and the buoys being on that side, furnish a guide for more exact steering by daylight, and that in making the turn from the Brewerton into

the Craighill channel it is more easily made on the outside of the curve.

The most experienced Chesapeake Bay pilots, in the habit of daily piloting the largest steamers, testify that there is no such custom. The president of the board of pilots expressly denies its existence, and says that they understand that the vessel desiring to proceed contrary to the statutory rule must get permission of the other vessel, and if the other vessel does not give it the rule must be obeyed.

No doubt the fact that heavy vessels do frequently ask for and obtain, by an interchange of signals, such permission, may have lead to an expectation that they will usually ask it, and smaller craft may, as a habit, hold themselves ready to accord it; but this is the extent to which the practice extends. It seems to me that its further extension is to be deprecated. These channels are traversed by vessels of all nations, and any attempt to depart from the well-known rules of maritime law, and to substitute local customs, not founded upon actual necessity, but upon mere convenience, is likely to lead to uncertainty and disaster. The dangers arising from a departure from settled rules of navigation have lead admiralty courts to hold that the local custom which is to justify such departure must be founded upon necessity arising from permanent local peculiarities, such as rocks, strong currents in crooked rivers, and the like, and that the exception should be as distinct and definite as the rule itself. Lowndes on Collisions, c. 3.

In the present case those in charge of the tug seem to have mistaken the Gulnare for a large steamer, and to have expected that she would want the eastern side of the channel, and they gave her, at the distance of nearly a mile, two blasts of the whistle as a signal that they proposed to take the western side. They received *no* reply, as they state, but they steered for the western side and proceeded without any further signal until the steamer was within three lengths of them, when they signalled again. The vessels had then got into such proximity that a collision was imminent if not unavoidable.

The case of *The Milwaukee*, 1 Brown, Adm. 313, is in many respects similar to the one under consideration, and is very ably discussed by Judge Longyear. He very distinctly states the law applicable to the case of a steamer which, in a narrow channel, has gone contrary to the statutory rule, and undertakes to justify herself by an interchange of signals. As he states it, the burden of proof is upon such a vessel to establish by clear and satisfactory proofs—(1) That a proposition to depart from the statute was made by her by means of the prescribed signals, and in due season for the other vessel to receive the proposition and act upon it with safety; (2) that the other vessel heard and understood the proposition thus made; (3) that the other vessel accepted the proposition.

Taking the case as made by the answer of the tug, and the testimony offered on her behalf, it plainly appears that those in charge of her relied on their expectation that the steamer would desire to take the eastern side of the channel,—that is to say, upon the custom which they allege to exist,—and paid no attention to the fact that their signal was not answered.

Dr. White, a passenger of the schooner who happened to be in the tug's pilot-house, testifies that he saw the steamer's green light when the tug's first signal was given; that they received no answer, and then the steamer's green light was shut out, and they saw her red and continued to see her red light until the steamer was within about the length of the court-room, when the second signal was given; that the steamer then answered with two whistles; that he was getting alarmed, and he said to the mate: "It is all right, now he has answered;" and the mate replied: "Yes, but she is showing her red light all the time; she don't change her course."

Richardson, the mate, who was at the wheel, says, when he gave the first two whistles and starboarded his wheel the steamer was about three-quarters of a mile off, and he expected she would want the east side of the channel, and he steered to bring himself on the western side; that he listened

for an answer, and, getting none, blew two more blasts, which were answered with two, and about that time the steamer's green light was shut in, and the steamer seemed about to run over them. He estimates that when the second signal was given the steamer was within two or three of her lengths from the tug.

The master of the tug, who was also in the pilot-house, tells substantially the same story. It is apparent, therefore, that those in charge of the tug, notwithstanding she received no answer to her first signal, persisted in going to the westward, and attempting to pass on the steamer's starboard side, until the steamer, continuing to show her red light and obviously also going to starboard, was so close that a collision with either the tug or her tow was almost certain. Whether the two blasts of her whistle, then given by the tug, were answered by the two blasts, as they claim, or with one, as those on the steamer testify, does not seem to me to be, in itself, a matter of serious importance, for neither vessel then had it in her power to perform any maneuver which would, except by some lucky chance, have averted the disaster. It is clear that the tug was in fault. I have had difficulty in satisfying myself as to whether or not the steamer was also to blame. No one, I think, could take up the consideration of the steamer's case without a leaning against her, and a predisposition to find her in fault. Her officers, although accustomed to the command of sailing vessels, were almost without experience in steamer navigation, and it was their first voyage in this steamer. They were not familiar with the channel, and they were running out in the night-time,—a very bold thing for them to undertake unassisted, and which reasonable prudence would seem to have forbidden. But because her officers were likely to fail in seamanship, I am not to take it for granted that they did, unless the evidence convicts them of it.

The steamer was, at the time of the collision, on that side of the channel on which she had a right to be; all her officers were at their posts of duty; they all testify that they heard the first signal of the tug, and that it was but one blast of the

whistle, and that they answered it with one blast. The vessels were then nearly a mile apart, and it is quite possible that, without neglect, they did so understand it, more especially as one blast was the signal they naturally expected to get. That their reply was not heard on board the tug may have been because the steamer's whistle appears not to have been a loud one. Supposing the tug was going to pass them on the port side, they immediately put their helm a little to port. They declare that they saw nothing to undeceive them, as to the tug's intention, until they heard her second signal and saw her green light, and then they were so close that all they could do was to stop and reverse. That the bells to stop were at once rung and obeyed I have no doubt, although I do doubt the assertion that the steamer was going astern when the schooner struck her. There would not appear to have been time sufficient for a propeller to have stopped her headway and begun to go astern; but that her headway was greatly checked, if not entirely overcome, is, I think, demonstrated by the character of the damage resulting from the collision, as well as by the direct testimony of those on board the steamer. The actions of the officers of the steamer are all consistent with their account of the signals as they claim to have heard them and to have answered them, and, unless I were to assume that they were ignorant of the meaning of the signals, I do not find anything which the law recognizes as a fault to convict them of having contributed to bring about this collision.

It is not improbable that a pilot familiar with the navigation of the channel, and having some suspicion of the expectation which was in the mind of the master of the tug, might have discovered something in her movements which would have arrested his attention in time to have averted the consequences of the tug's fault; but to undertake to hold the steamer legally blamable because her officers did not have this high degree of local experience would be, I think, unwise, as by a strict adherence to the statutory rules the navigation of the channel should be safe to mariners having the ordinary experience and capacity necessary to navigate vessels.

I have not overlooked the question of the steamer's speed. She would appear to have been under three bells, at about three-quarters speed, say from seven to eight miles an hour. She was a very small steamer, easily handled, and drawing only from ten to twelve feet of water, and she could, without much risk of grounding, have run outside of the channel on either side. Such speed on a clear night, when lights can be plainly seen, is ordinarily perfectly safe for such a vessel, and I cannot see that under the circumstances it was improper.

I had in the case of *Appleby v. The Kate Irving*, 2 FED. REP. 924, to consider the question of speed in these channels, and in that case held the steamer to blame for proceeding at eight miles an hour, which was her full speed. That, however, was a heavily-laden steamer of 1,500 tons, compelled by her draught of water to keep in the channel, and keeping up her full speed with an obstruction right ahead and in full view; and in that case it appeared to me that the collision resulted in part from a sheer the steamer took arising in great part from her high speed and the difficulty of steering her in the channel, and that, as she had timely notice that the approaching vessels must get out of her way in order to avoid a collision, she should have slackened her speed or have been going at a less rate to enable them to do it, and I divided the damages.

In the present case, upon all the testimony, I am brought to the conclusion, although I confess with some hesitation, that the steamer is not in fault, and that the tug must bear the whole damage. Nothing has appeared to lead me to think that the schooner committed any fault, or that any mismanagement is to be imputed to her.

THE GALINA.

(District Court, E. D. New York. ———, 1881.)

1. DESERTION—FORFEITURE OF WAGES.

Where an assistant engineer of a steam-ship, after a disagreement with the chief engineer, was ordered off duty, and left, but did not leave the vessel, and afterwards the chief engineer requested him to go to work again, but he refused, and being sent for by the captain was told that he must go to work or leave the ship, whereupon he left and brought an action to recover his wages:

Held, that his refusal to return to his duty, and his leaving of the ship thereafter, make out a case of desertion and entail forfeiture of wages earned.

A. L. Bowie, for libellant.

Ullö, Reynand & Harris, for respondent.

BENEDICT, D. J. The evidence does not show facts that entitled the libellant to refuse to do the work for which he had shipped. His refusal to return to his duty when directed so to do, and thereafter leaving the ship, make out a case of desertion and entail a forfeiture of the wages already earned.

The libel is accordingly dismissed.

END OF CASES IN VOL. 6